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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENFORCEMENT OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT: 1979 TO 1982

AN INFORMATION PAPER

PREPARED BY THE STAFF OF THE

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

NOVEMBER 1982

This document has been printed for information purposes. It does not offer findings or recommendations by this committee

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PREFACE

The Senate Special Committee on Aging has had a longstanding interest in policies and legislation that promote continued employment opportunities for older persons who are willing and able to work. Age discrimination in employment continues to be a major reason why middle aged and older workers are systematically excluded from the opportunity to work. The major legislative response to this concern, the Age Discrimination in Employment Act (ADEA), was first enacted in December 1967, and amended in 1978.

During the first 10 years after its enactment, enforcement of the ADEA was the responsibility of the Department of Labor (DOL). In 1979, by Executive order, enforcement responsibility for the ADEA shifted from DOL to the Equal Employment Opportunity Commission (EEOC). The purpose of this shift was to consolidate all Federal enforcement of job-related civil rights actions into one agency. The EEOC has never been subject to thorough congressional oversight of its responsibilities under the ADEA.

Because these enforcement activities are of such critical importance, the Special Committee on Aging began conducting oversight proceedings in September 1981. This report is the result of the committee staff's comprehensive overview of the first 3 years of the EEOC's enforcement of the ADEA. It reviews and assesses the manner in which the Commission has absorbed and discharged its new responsibilities under the ADEA and suggests recommendations to strengthen the EEOC's future efforts in the area of ADEA enforcement.

The transfer of ADEA enforcement responsibility from DOL to the EEOC raised a number of issues and concerns about the adequacy of protection EEOC could offer older workers experiencing age discrimination. A report by the EEOC placed the number of complaints received during fiscal year 1980 at 8,799 (combined State and Federal charge intake); the number exceeded 10,000 by the end of fiscal year 1981. Age discrimination charges constitute a significant portion of the EEOC's caseload. Indeed, the age-related jurisdiction is the fastest growing of all civil rights enforcement statutes. The magnitude of the problem of age discrimination, as well as the increasing importance of enforcement measures designed to combat such discriminatory practices, underscore the necessity for the EEOC to engage in sound policy development; to utilize effective charge-processing systems; to undertake investigations on its own initiative to uncover patterns and practices of age discrimination; and to undertake meaningful enforcement programs through carefully selected litigation vehicles.

Since this report was drafted, the EEOC has undergone a reorganization designed to improve the overall management of the agency through consolidation of related functions. While this report assesses ADEA enforcement in the context of the agency's existing organizational structure, most of the preliminary findings and recommendations are substantive in nature, and thus may well apply regardless of the reorganization.

This paper was prepared for the committee with the assistance of Christine Owens, former special assistant to the Vice Chairman of the EEOC and now a private consultant on matters relating to equal employment opportunity.

As the proportion of older workers in the labor force grows over the coming years, the Commission will be called upon to become ever more sensitive to the employment rights of older workers. We also believe that the Commission has a very important role to play in educating employers, unions, and employees about the need to keep older workers productive in society. This oversight report both identifies existing problem areas and recommends ways in which the Commission can improve its ADEA enforcement activity. The Commission's response to these recommendations is reprinted as an appendix to this report.

JOHN HEINZ,
Chairman.
LAWTON CHILES,
Ranking Minority Members.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ENFORCEMENT OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT: 1979 TO 1982

EXECUTIVE SUMMARY

Pursuant to Reorganization Plan No. 1 of 1978, enforcement responsibility for the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. (ADEA), was transferred from the Department of Labor to the Equal Employment Opportunity Commission (EEOC), effective July 1979. Prior to the transfer, the Department of Labor and the EEOC entered into two memoranda of understanding (MOU) designed to assure a smooth transition of responsibility, cases, personnel, and resources. The first, signed in October 1978, addressed itself largely to issues affecting the transfer and training of personnel, the availability of enforcement files, and the manner and extent to which the agencies would cooperate in enforcement activities before and after the transfer. The second MOU was issued immediately prior to the transfer, and dealt with the division of responsibility as to the 61 lawsuits then pending under the ADEA. The final reorganization plan specified that a budget of $3.5 million and 119 staff positions were to be transferred. About one-half of the transferred positions were filled by former DOL employees; however, only eight attorneys—three in headquarters and five in the field—transferred to the EEOC. Virtually all of the ADEA positions were filled by September 30, 1979.

From the outset, the EEOC established (and has since maintained) discrete units for processing ADEA and Equal Pay Act (EPA) charges and complaints in each of its 22 district offices. In addition, ADEA/EPA units were established in four area offices—Boston, Tampa, Pittsburgh, and Kansas City—where high concentrations of ADEA charge intake were anticipated. Several additional area offices have since designated a few personnel for ADEA charge processing; however, the majority of area offices engage in no ADEA charge processing activities. Rather, they transmit ADEA charges filed with them to the appropriate district office for processing.

The reorganization and transition period were characterized by several not entirely unexpected or unusual problems.

First, there were rather serious morale problems. It appears that these morale problems have been substantially eliminated or resolved at this point.

Second, training for the new EEOC employees, hired or transferred into those ADEA positions not filled by DOL employees, was inadequate. While there was supervisor training (both for ADEA and intake supervisors) prior to the transfer of authority, actual training of field investigators (equal opportunity specialists or EOS's) was not completed until several months after the transfer. Nor was there any headquarters training of field intake officers with respect to the new ADEA and EPA jurisdictions. Although these individuals are not involved in the investigation of charges, their positions are pivotal ones, since they serve as the Commission's front line officers in receiving charges and counseling complainants. Thus, the Commission's own unfamiliarity with the ADEA was exacerbated by the inadequate training of its personnel whose job it was to enforce the act's provisions.

Third, the coordination between the EEOC and DOL apparently did not work in some respects. For example, although both agencies had agreed that the Department would continue to receive charges filed under the ADEA and then transmit them to the appropriate EEOC district office, in fact there were very few referrals. While it is possible that the Labor field offices simply advised complainants orally that they should file their charges with the EEOC (and thus did not take charges), there was some concern that potential charging parties were simply being discouraged from pursuing their ADEA rights by what they perceived as bureaucratic morass. In addition, ADEA litigation suffered a severe shortfall during fiscal year 1979. The Department filed only nine lawsuits from October 1978 until July 1979, and the Commission filed only an additional 16 during the remainder of the fiscal year; most of these had previously been developed by DOL. This latter situation was fortunately remedied in the succeeding fiscal years, when the Commission filed over 130 lawsuits.

Fourth, the Commission's decision to utilize existing DOL procedures for the processing and investigation of ADEA charges generated a substantial amount of confusion in all quarters. Respondents complained that they were subject to different investigative approaches under title VII and the ADEA; charging parties were confused and distressed that their ADEA charges often received only cursory review, at best. Former DOL ADEA compliance officers complained that the Commission's unfamiliarity with the ADEA and the traditional investigative approach created obstacles to enforcement efforts. These problems were finally addressed in the fall of 1980, when the Commission established an in-house task force to develop ADEA investigative procedures. These procedures, modeled extensively after those used in title VII enforcement, were approved in November 1981 and have recently been implemented on a nationwide basis.

Fifth, the Commission experienced what it considered to be an unexpectedly large increase in ADEA charge intake during the latter part of fiscal years 1979 and 1980 (intake grew from approximately 5,800 charges in fiscal year 1979 to approximately 8,800 in fiscal year 1980). This increase in charge filings resulted in the Commission's dedication of virtually all of its ADEA resources (and indeed, resources borrowed from title VII) to individual charge processing. As a result, directed investigative activity fell dramatically, from DOL's figure of approximately 650 directed investigations in fiscal year 1979 to less than 100 EEOC directed investigations in both fiscal years 1980 and 1981.

Sixth, the unexpected nature of the charge increase reflects, to some degree, a lack of planning and coordination on the part of the EEOC. While there probably was some substantial increase in charges filed under the ADEA (as there has been under title VII almost every year since its enactment), there were also a number of factors which the Commission could have foreseen and should have taken into account which explain at least some portion of the increase:

—The Commission counts its charges by numbers of charging parties; the Department of Labor counted charges in accordance with numbers of respondents. Thus, one occurrence—the termination of 30 employees by a single employer—might give rise to 30 charges as measured by the EEOC but only one charge as measured by DOL. This difference in recording of charges no doubt accounted for some of the apparent increase in charge filings.

—The ADEA was amended in 1978, shortly before the EEOC assumed jurisdiction. These amendments inevitably generated increased charge filings, because of the raising of the upper age limits, the explicit prohibition of mandatory retirement, and the general heightened awareness of the ADEA attendant upon the amendment process.

—From the outset, the EEOC intake officers were directed to counsel title VII charging parties within the protected age groups as to their rights under the ADEA. This counseling undoubtedly gave rise to an increased number of ADEA charges, as well as concurrent ADEA and title VII charges.

—The Department of Labor (apparently far more than the EEOC) actively discouraged the filing of ADEA charges where it believed that the claims were weak. While the EEOC similarly might counsel against the filing of charges, its position has always been that it must accept all charges filed. Many current and former DOL employees believe that the increase in ADEA charges resulted in large measure because of this greater willingness on the part of the EEOC to accept all charges.

Each of these factors could have been considered in advance of the reorganization. Had they been given sufficient attention, the Commission would not have been caught so off guard by the increase in charge filings and could have done a more adequate job of developing an integrated enforcement program, focusing on both individual charge processing and directed investigative activity.

Finally, the EEOC was handicapped in its assumption of the ADEA jurisdiction by the extreme inadequacy of resources transferred to it. Almost from the outset, the Commission has devoted substantially more to its ADEA program than the $3.5 million budget and 119 positions transferred from Labor. Indeed, the Commission transferred title VII positions into the age enforcement program during both fiscal years 1980 and 1981. The current budgetary allocation for the ADEA program is 128 positions and approximately $14 million.

A. CURRENT ADMINISTRATIVE ENFORCEMENT

Administrative enforcement activities are accomplished through a decentralized structure of field offices scattered throughout the Nation, with planning and monitoring responsibilities localized in the headquarters Office of Field Services. Within the Office of Field Services, three divisions—the Age and Equal Pay Branch of the Technical

Guidance Division, the Office of Field Management, and the Operations Evaluation Division—have line responsibility for developing ADEA enforcement procedures; monitoring the performance and productivity of field offices; engaging in problem spotting and solving; providing training to field investigators; reviewing case files to make both qualitative and procedural assessments of investigations; and providing substantive expertise with respect to various issues raised during the course of investigations.

In the field, there are 22 district offices which engage in the full panoply of Commission operations: Intake, factfinding, full investigation, systemic targeting under title VII, and litigation. Each district office maintains an ADEA or ADEA/EPA unit, with compliance professional staffing that ranges from three to nine full-time investigators, presumably depending on ADEA caseload, office caseloads under other statutes, and availability of resources. There are an additional 27 area offices, which offer a more limited range of Commission services. All are available for charge intake and most have title VII factfinding units. Only three—Boston, Pittsburgh, and Kansas City—have ADEA charge processing units, while three others—Greensboro, El Paso, and San Antonio—have each designated one individual to process ADEA charges.

The Commission has also contracted with 25 State fair employment practices agencies for the processing of a specified number of ADEA charges, consisting of both the agency's own workload as well as EEOC transmittals. State agencies have currently contracted for the processing of 2,826 charges of which 753 (or 27 percent) are from the Commission's own caseload. The agencies are reimbursed $375 for each charge processed pursuant to these agreements.

Processing of ADEA charges may be accomplished through one of three approaches developed by the Commission:

First, a certain percentage of charges are scheduled for "*notice and settlement attempt*" *only*. These are generally those charges which are either unlikely to lead to findings of violation or result in meaningful settlements or which are likely to be pursued through private litigation, regardless of the Commission's processing efforts.

The second and principal mode of processing is *ADEA factfinding*. Modeled after title VII procedures, factfinding combines a focus on initial investigative efforts with a strong emphasis on early "no-fault" settlements. The Commission projects that approximately 80 percent of all charges will be processed through factfinding, with a settlement rate of 23 percent.

The third and final processing model is *full investigation*. Cases slated for full investigations are those which are neither settled nor closed as a result of factfinding; those initiated as directed investigations; and those targeted at [illegible] (or early in the course of administrative processing) as raising issues, identifying respondents, or affecting such a significantly large number of persons as to justify the dedication of substantially greater investigative resources. Several restrictions are imposed on full investigations. First, the Office of Field Services projects that no more than 20 percent of an office's caseload will be comprised of full investigations. Second, investigations are not to be initiated at the expense of individual charge processing; that is, the Commission attaches a higher priority to individual processing than to full investigations. And third, there are stringent limitations—due to resource shortages—on onsite investigations. To the extent possible, all investigations are to be conducted through written interrogatories and over the telephone.

The Commission's processing and investigative procedures represent a significant departure from those relied upon by the Department of Labor in several respects. They are more formal and are governed both by the in-house compliance manual and (proposed) procedural regulations. They commit the Commission to the issuance of formal letters of violation after a finding of violation has been made. The ADEA does not require such letters nor did Labor ever issue them in the past. The Commission's procedures also are much more clearly focused on individual charge resolution, as opposed to the Department of Labor's investigative approach. Thus, unlike Labor, the Commission seeks to assure that each charging party will receive some—though perhaps limited—attention. On the other hand, that individual attention is often in the form of playing the role of mediator, as opposed to investigator.

In terms of the actual administrative experience and performance under the ADEA to date, the EEOC reports the following results:

Charge filings: Fiscal year 1979, 5,374; fiscal year 1980, 8,779; fiscal year 1981, 8,101 (EEOC receipts only); end of second quarter, fiscal year 1982, 4,016 (unreconciled figure).

Directed investigations: Fiscal year 1979, 663; fiscal year 1980, 80+ (see discussion on page 34); fiscal year 1981, 84.

Settlements: Fiscal year 1979 (not available); fiscal year 1980, 1,270; fiscal year 1981, 2,787.

Closures: Fiscal year 1979 (not available); fiscal year 1980, 6,488; fiscal year 1981, 7,864.

Benefits: Fiscal year 1979 (not available); fiscal year 1980, $12,312,000; fiscal year 1981, $28,031,000.

In fiscal year 1979, the ADEA charge intake was 15 percent that of title VII. By fiscal year 1981, it had grown to 19 percent of the title VII intake. Staffing and resources for ADEA compliance activities has enjoyed a corresponding growth relative to title VII enforcement resources. Title VII field compliance staffing has shown a rather steady decline—from a fiscal year 1979 figure of 1,212 positions to a current actual figure of 1,208 positions—while ADEA staffing has steadily increased—from a fiscal year 1979 actual figure of 108 to a current actual figure of 128.

Similarly, ADEA enforcement has absorbed an increasingly larger proportion of the Commission's budget with each succeeding year. Despite this growth, there still appears to be some understaffing of the ADEA function relative to title VII. At the present time, the proportion of ADEA staffing to title VII is projected for only slightly more than 10 percent; this figure is even lower if some of the personnel designated as ADEA staff in fact are also responsible for EPA enforcement activities. This 10 percent figure compares to the current ADEA/title VII charge intake ratio of 19 percent.

While the EEOC has in many ways handled its ADEA enforcement responsibilities admirably, the following specific problems warrant immediate attention and appropriate followup action:

(1) *The Commission has failed to direct adequate resources to directed investigations under the ADEA.* In fiscal year 1981, Commission district offices, on the average, only initiated 3.5 directed investigations. The number of directed investigations per office bore little or no relationship to the office's charge intake or caseload. Rather, the failure to institute significant numbers of directed investigations seemingly stemmed from inadequate advance planning and insufficient priority attached to directed work. In addition, various institutional procedures and requirements apparently operate as a disincentive to the initiation of directed investigations.

(2) *The Commission has failed to develop any systemic enforcement activity under the ADEA.* Under title VII, the Commission operates an independent office of systemic programs, with staffing in headquarters and the field, whose sole function is the development of systemic targets, investigation, and litigation of those cases. The Commission attaches a high priority to these title VII systemic enforcement efforts. By contrast, the Commission has dedicated no ADEA personnel or resources to the development of an ADEA systemic enforcement program. Rather, all ADEA enforcement responsibilities are consolidated into one age (or age/EPA) unit in headquarters, with corresponding offices in the field. These units are not expected or required to initiate systemic ADEA investigations or to develop ADEA systemic litigation targets. There is no apparent reason for the difference in treatment with respect to systemic enforcement between the Commission's title VII and ADEA functions.

(3) *Proposed changes in organizational structure and processing procedures may prove disadvantageous from the standpoint of ADEA enforcement.* The committee has been advised that the following changes in organizational structure and processing procedures are currently under contemplation by the EEOC:

—Closing of various area and district offices.
—Reductions in compliance staffing.
—Merger of all charge processing units.

A longstanding concern of members of this committee, as well as the House Select Committee on Aging, has been that the significantly lower number of EEOC offices available for charge intake and processing compared to those previously maintained by the Department of Labor—49 versus several hundred—may have limited the access of potential complainants to ADEA remedies. The fact that charge intake has increased since the EEOC's assumption of the ADEA jurisdiction may indicate that this concern was baseless. However, the Commission has never compared its own intake to that of the Department of Labor to determine whether any variations have occurred on a local or regional basis. Thus, the mere increase in charge filings alone is an insufficient basis for concluding that the significantly lower number of offices and their greater geographical dispersion has had no effect on the ability of ADEA complainants to pursue their ADEA remedies. In the absence of such an analysis, the closing of area and district offices would give rise to renewed concerns about accessibility and visibility.

Similarly, reductions in compliance staffing may well have a significant negative impact on ADEA charge processing and investigative activities. Any necessary reductions should be carefully scrutinized to assure that no statute administered by the Commission bears a disproportionate burden of the reduction. In addition, the Commission should analyze its State and local contracting program to determine whether State agencies may assume additional portions of the Commission's ADEA caseload, thereby minimizing somewhat the impact of staff reductions.

Finally, it does not appear that the Commission has gained sufficient expertise in ADEA charge processing and investigation to warrant merger of all processing units. ADEA training has been sparse. ADEA procedural guidelines have only recently been developed and implemented in the field. And the development of the ADEA interpretative compliance manual is still in its embryonic stage. Equally important, there has been little or no cross-training of EEOC compliance officers in jurisdictions other than those which they currently administer. Against this backdrop, it seems entirely unlikely that the agency's investigators can function effectively as "generalists"; rather, serious damage to each enforcement function may well occur in the absence of continued specialization under each statute.

(4) *The Commission should determine whether assignment of ADEA enforcement personnel to various area offices would enhance its compliance efforts.* At the present time, a total of 21 of the Commission's 49 offices have no age processing staff. Several of these area offices have ADEA charge intake in excess of that of various district offices, and one—Minneapolis—has an ADEA charge intake which exceeds that of virtually all district offices. Of the 21 area offices without age staff, 10 are located in States in which there are no State fair employment practices agencies. There is, thus, no ADEA enforcement presence in those States at all.

(5) *The Commission needs to assess its distribution of ADEA enforcement personnel compared to caseloads on a nationwide basis to determine whether movement of slots among offices is appropriate.* Analysis of ADEA intake per office compared to ADEA staffing per office indicates that there is some maldistribution nationwide of ADEA enforcement resources. This distribution needs to be assessed immediately, especially in light of projected staff reductions.

(6) *The EEOC should undertake an assessment of the effect that the introduction of new charge-processing procedures has had on substantive ADEA enforcement.* New charge-processing procedures may have affected ADEA enforcement in two respects. First, potentially strong enforcement vehicles may well be lost as a result of the pressure to settle as many cases as possible early in the process. And second, the extent to which the Commission has formalized its ADEA enforcement procedures may have limited the ability of investigators to negotiate findings of violations, since respondents may resist entering into settlement negotiations until they see whether the Commission will issue a formal letter of violation.

(7) *The Commission should carefully review its reporting procedures and instruments to assure that reports relative to enforcement activities are accurate and actually reflect compliance activity and remedies obtained.* Various inconsistencies, unexplained variations and apparent errors in the reports submitted to the committee by the Commission made development of precise calculations with respect to enforcement indicia quite difficult. In addition, these inconsistencies

rendered the monitoring of trends imprecise at best. Finally, the extent to which some reported figures appeared inflated raised questions about the credibility of the underlying reporting system. Since these reports are the primary basis for review of the Commission's activities, the Commission must insure their consistency, precision, and uniformity.

B. Enforcement Activities Through the Office of General Counsel

The Commission's Office of General Counsel is primarily responsible for the conduct of all litigation approved by the Commission. Litigation of all ADEA cases is conducted by attorneys in the field; there is no headquarters ADEA litigation program. Three attorneys in the headquarters Trial Division are responsible for reviewing all litigation recommendations emanating from the field and providing technical advice with respect to those cases actually in litigation.

The Commission's ADEA litigation program grew substantially during the first 2 full years of the Commission's enforcement responsibilities. While only 25 lawsuits were filed (by the Commission and Labor) in fiscal year 1979, that number rose to 52 in fiscal year 1980 and to 89 in fiscal year 1981. However, the number of litigation approvals has dropped alarmingly in fiscal year 1982; by April 1, 1982, only 12 ADEA cases had been approved for filing.

The EEOC's trial litigation program is complemented by the work of its Appellate Division. Since the EEOC assumed jurisdiction of the ADEA, the Appellate Division has filed 22 ADEA appeals and participated as *amicus* in 18 additional private actions. The Commission has established a presence in every circuit court in the Nation. In addition, its appellate and *amicus* cases reflect a good mix of both substantive and procedural issues, demonstrating very careful planning and a conscious effort on the part of the division to utilize its resources in a balanced manner.

By all accounts, the ADEA litigation program has fared much better at the EEOC than it ever did at the Department of Labor. The Commission has devoted substantial resources to the development of a reasonably comprehensive litigation and appeals portfolio and has clearly established that it will actively and vigorously pursue ADEA enforcement. The Commission should be encouraged to maintain this high level of litigation activity. At the same time, however, it should address the following specific concerns:

(1) *The issues pursued through the Commission's litigation enforcement program may correspond too closely to those alleged in charges.* The percentage of Commission lawsuits filed with respect to various substantive issues (e.g., hiring, firing, benefits) closely parallels the percentage of all administrative charges/allegations of violations with respect to those issues. For example, discharge and layoff cases form the overwhelming majority of suits, and likewise account for an overwhelming majority of all administrative charges. While this significant correlation between issues in lawsuits and charges indicates a responsiveness of the litigation program to charging party demand, there are several potential drawbacks to structuring a litigation program which parallels charge filings so closely. Obviously, those em-

ployment practices which, though discriminatory, do not give rise to a significant number of charges will be left largely unredressed by the Commission's litigation program.

Many such issues are those which involve novel or unsettled questions of law on which charging parties, respondents, and courts need Commission guidance. In addition, they may involve practices which impact peculiarly on certain subclasses of older workers while not impacting on others. Thus, the Commission should assess its litigation program to determine whether certain issues or groups of older workers are underrepresented as a result of the charge-responsive nature of its lawsuits.

(2) *The Commission needs to assess carefully the ADEA litigation dockets of district offices, as well as the national docket to determine whether they are balanced with respect to total numbers of lawsuits filed, types of respondents sued, and violations alleged.* The Commission supplied copies of 108 complaints in EEOC ADEA lawsuits for review as part of the oversight process. Based on these complaints, it is evident that there were ADEA litigation shortfalls relative to charge intake in a number of district offices. Others had higher than would be expected ratios of litigation to charge filings. The complaints also revealed an extremely wide range among district offices with respect to total numbers of ADEA lawsuits filed, from a low of 1 to a high of 14. While these figures might not correspond to actual experience under the ADEA (because the EEOC's submission of 108 complaints did not represent all the ADEA lawsuits it has filed), they are sufficiently reliable to indicate that closer scrutiny of various district offices' performance is in order.

Relying again upon the 108 complaints submitted, an analysis was conducted of the nature of respondent sued by each district office. That analysis revealed that nationwide, 43 percent of all Commission lawsuits were against public employers, with 57 percent against private employers. These figures compare to a charge-filing ratio of 14 percent public versus 86 percent private respondents.

The excessive concentration of suits in the public sector results in substantially lower numbers of suits than might be expected in other sectors of the economy. For example, the manufacturing sector accounts for 28 percent of all charges, but only 18 percent of all lawsuits; the services sector accounts for 21 percent of charges but only 13 percent of lawsuits; and the trade/retail sector accounts for 11 percent of charges but only 2 percent of lawsuits. Also, because of this heavy concentration of suits in the public sector, most of which challenged mandatory hiring and termination ages for police officers and firefighters, a number of potential substantive ADEA violations were left unredressed by the Commission litigation programs.

(3) *The excessive number of lawsuits filed in police and firefighter age cases operates to the detriment of the rest of the litigation program.* Nearly one-quarter of the Commission's ADEA litigation docket consists of cases challenging age rules for police and firefighter positions. Some district offices have filed as many as five or six of these actions. While there is no question that the police/firefighter cases raise significant legal and policy issues, the concentration of suits in this area precludes the Commission from bringing equally meritorious cases involving other issues against different types of employers. It

also reflects an inefficient use of scarce litigation resources to deal with a basic policy issue which might have been largely resolved in a more expeditious and less costly fashion through the Commission's section 9 rulemaking authority.

(4) *The Commission should reconstitute the ADEA litigation strategy task force for purposes of determining and directing appropriate litigation strategy.* The Commission has previously established a title VII litigation strategy task force, which plans and directs nationwide litigation strategy with respect to various title VII issues. At one time, a similar ADEA ad hoc task force was formed; it was subsequently disbanded and there is currently no body within the Commission which engages in ADEA litigation strategy planning. The Commission needs to reconstitute its ADEA task force, with representatives from various divisions within the agency who can then assure that the functions of compliance side enforcement, policy development, and litigation are conducted in an integrated fashion.

(5) *The Commission should review the institutional structure of the Office of General Counsel to determine whether establishment of a discrete ADEA unit would enhance its litigation enforcement efforts.* The Commission's age litigation program has no distinct organizational identity whatsoever. Rather, when the age enforcement function was transferred to the EEOC, the age attorneys were simply moved into title VII units. While they have always worked exclusively in the age area, it may well be that the creation of a separate age unit would give ADEA issues greater visibility, facilitate monitoring, and effectuate the development of policy through litigation. Such a unit could also develop an ADEA "systemic" litigation focus.

(6) *The Commission needs to make greater use of its combined enforcement authorities through its litigation program.* Transfer of the ADEA enforcement authority to the Commission placed it in the unique position of being able to combine enforcement efforts under various statutes. If, for example, an older woman were the victim of both age and sex discrimination, the Commission could file a combined title VII/ADEA lawsuit. Such combined actions, where appropriate, would greatly enhance the Government's antidiscrimination efforts. However, the Commission to date has filed no combined title VII/ADEA actions.

(7) *The Commission should increase its efforts to track private ADEA litigation and provide assistance to the private bar.* The Trial Division of the Commission currently engages in virtually no tracking of private ADEA litigation. Nor has the Commission provided technical assistance to private attorneys bringing ADEA actions. Because the bulk of all plaintiffs' civil rights actions, including ADEA suits, are filed by private parties, and because this litigation obviously complements and enhances the Government's own enforcement program, it is essential for the Commission to utilize its technical expertise in providing advice and assistance to the private bar.

(8) *The Commission needs to develop routine reporting instruments for monitoring the activities of the Office of General Counsel.* The Commission currently does not utilize any routine monitoring device to determine the numbers or types of cases submitted to the General Counsel for litigation approval or the action taken on those. A periodic report from the Office of General Counsel reflecting this information

would enable the Commission to monitor its litigation program more carefully and determine if the policies and enforcement strategies it wishes to develop are being effectively pursued.

C. COMMISSION POLICY DEVELOPMENT UNDER THE ADEA

The organizational structure and resources devoted to policy development under the ADEA are vastly different from and inferior to those which the Commission has dedicated to title VII policy development. For title VII policy, the Commission maintains a separate Office of Policy Implementation, fully staffed by lawyers. This office reports directly to the Chair and the Commission. The General Counsel's only role in title VII policy development is purely advisory in nature.

Commission ADEA policy development presents a sharply different picture. There is not only no single office devoted exclusively to ADEA policy development, but there is in fact no single individual whose sole or primary responsibility is ADEA policy development. Virtually all policy under the ADEA emanates from the Legal Counsel Division of the Office of General Counsel. Thus the ADEA does not enjoy the clear separation between "policy" and "enforcement" which the Commission maintains for title VII. Largely as a result of this organizational structure, the following problems have characterized ADEA policy development at the Commission:

(1) *Policy development at the Commission has been excruciatingly slow and indecisive.* The Commission first published proposed ADEA interpretations in late 1979; none, however, were published in final form until the end of 1981 or beginning of 1982. While some of this delay was attributable to the fact that the Commission was "reconsidering" certain Labor Department interpretations—the applicability of the ADEA to age limits for entry into apprenticeship programs and employee benefits issues—ultimately, the Commission has either adopted or is currently contemplating adoption of virtually all existing Labor Department positions.

(2) *The Commission has failed to use its section 9 rulemaking authority to effect rational policy development.* Section 9 of the ADEA authorizes the Commission to hold hearings and publish binding rules under the ADEA, as well as issue exemptions to its requirements. The Commission has consciously declined to use its authority under section 9 in at least two instances when such use would have been appropriate and, indeed, may have been required.

Rejecting staff recommendations, the Commission chose to utilize litigation as the strategy for developing policy with respect to police and firefighter cases, as opposed to issuing a rule under section 9. While the Commission was certainly not required to use its section 9 authority in this regard, that approach would have been more efficient both from the standpoint of policy development and the rational use of limited legal resources than its case-by-case litigation strategy.

The Commission also declined to institute proceedings under section 9 when it was considering whether to adopt the Labor Department's interpretation that bona fide apprenticeship programs are not subject to the ADEA. Since the Commission's ultimate decision to adopt the Labor position in effect granted an "exemption" to apprenticeship programs, arguably the ADEA required that the Commission invoke section 9 proceedings in order to adopt Labor's position. However, the Commission consciously refused to do so.

(3) *The Commission has apparently not engaged in a careful program of tracking charge filing to determine the nature and extent of age discrimination within various industries or among various age groups.* There exists a wealth of information available to the Commission from which the EEOC could readily determine patterns of age discrimination within various industries, among age groups, and with respect to specific practices. Monitoring of this information would enable the Commission to structure its policies to respond to age-related problems and needs of older workers and/or employers. However, it does not appear that the Commission has engaged in this type of careful monitoring in order to fashion policies responsive to these needs.

(4) *The Commission has failed to identify potential areas of conflict between title VII and ADEA and develop plans for addressing and resolving those conflicts.* At least three actual or potential areas of conflict between title VII and ADEA enforcement policies and priorities arguably pit the interests of women and/or minorities against those of older workers. These are:

—*Age limits for entry into apprenticeship programs:* The view among some members of the Commission—which ultimately prevailed—was that elimination of maximum age limits for admission into apprenticeship programs would operate to minimize training opportunities for minority youth, because older workers would bid successfully for admission into the programs.

—*Seniority systems and layoffs:* In its ADEA interpretations, the Commission stresses that the sine qua non of a bona fide seniority system is that it apportion rights and benefits on the basis of length of service; thus, in most instances older workers would presumably be the primary beneficiaries of the operation of a bona fide seniority system. Under title VII, however, the Commission encourages employers and unions to develop staff reduction alternatives, other than strict reliance on the "last-in, first-out" layoff procedures characterizing most seniority systems. Application of the "LIFO" principle has its greatest impact on the newest entrants to the work force, i.e., the pool in which women and minorities are often disproportionately located.

—*Incentives to early retirement:* Employers increasingly are asking the Commission to review their proposed early retirement programs, to determine whether they comply with the ADEA. One rationale which employers will undoubtedly cite for approval of these programs will be the necessity to preserve employment opportunities for women and minorities created by bona fide affirmative action programs.

To the extent that the Commission has dealt with these or other potential areas of title VII/ADEA conflict, it has done so on an ad hoc basis, with the conflict resolved in favor of the title VII interests. Unless the Commission begins immediately to assess the future potential for such conflicts and develop strategies for resolving them, the rights of older workers may well be subordinated to those of title VII protected classes.

D. RECENT DEVELOPMENTS AT THE EEOC: ADDITIONAL AND CONCLUDING COMMENTS

Finally, reports of recent events at the Commission give rise to a substantial amount of concern about the manner in which enforcement responsibilities will be discharged in the future. Extensive and apparently unwarranted personnel changes, especially in the Office of General Counsel, have damaged morale seriously, thereby threatening to undermine enforcement efforts. The severe litigation shortfall also sends out signals that the Commission is retreating from its vigorous enforcement of the ADEA, as well as the other statutes it administers. While there is no question that the inflationary costs of litigation, coupled with budget reductions necessitate some belt-tightening at the Commission, neither of these considerations justifies a retrenchment of enforcement effort. The Commission needs to guard against even the appearance of such a retreat from its statutory mandate.

Chapter 1

INTRODUCTION

Pursuant to Reorganization Plan No. 1 of 1978, enforcement responsibility for the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. (hereinafter, the act or the ADEA), was transferred to the Equal Employment Opportunity Commission (EEOC) in July 1979. The ADEA is a general antidiscrimination statute, prohibiting a host of age-based adverse employment practices.[1] In its current form, the statute resembles an amalgam of the principal Federal laws designed to safeguard the rights of workers to be free from specified arbitrary and non-job-related employment practices and policies. Its substantive prohibitions, for example, parallel those of the EEOC's enabling statute, title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.[2] The ADEA's investigative and enforcement scheme is modeled after the Fair Labor Standards Act of 1938, 29 U.S.C. 201 et seq. (FLSA), though the procedural rights and requirements imposed on the agency and complainants borrow from both title VII and the FLSA.[3]

Prior to the transfer of authority in July 1979, the ADEA was administered by the Wage and Hour Division of the Department of Labor. The Department relied upon its general FLSA enforcement procedures in carrying out its functions under the ADEA. Thus, although the ADEA required the filing of a notice of intent to sue[4] with Labor as a prerequisite to private civil actions, the Department did not perceive its primary function as one of individual charge processing. Rather, its enforcement activities were concentrated on investigating respondents against whom multiple charges had been filed or whom the Department had targeted for investigation, pursuant to its independent authority.

The EEOC, on the other hand, historically had enforced title VII, a statute which mandated that the agency reach a determination with respect to each charge filed. Because of the sheer volume of title VII charges,[5] the statutorily prescribed administrative process, and the absence—until 1972—of any independent enforcement authority, the EEOC's processes, of necessity, focused largely on individual charge processing and voluntary conciliation. Although section 707 of title VII empowers the Commission to institute investigations when it has cause to believe that a potential respondent is engaged in a pattern or practice of discrimination, this authority has only recently begun to be effectively utilized on a priority basis by the Commission's Office of Systemic Programs.

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[1] In relevant part, the act provides that it shall be unlawful for an employer to—

> (1) fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual * * * because of * * * age;
>
> (2) limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of * * * age. § 4(a), 29 U.S.C. 621 et seq.

Similar prohibitions regulate the conduct of unions and employment agencies.

[2] Title VII prohibits discrimination based on race, sex, religion, national origin, or color. When the Fair Employment Practices Bill was first introduced in 1963, age was included as a prohibited basis. Congress, however, deleted age from coverage under title VII, directing the Secretary of Labor to conduct a study focusing on the incidence of age discrimination and the appropriate statutory vehicle(s) for dealing with the problem of age discrimination.

[3] In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), for example, the court upheld the right of a private plaintiff to demand a jury trial under the ADEA, on the basis of the ADEA's incorporation of FLSA enforcement procedures. On the other hand, in *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979), the court stressed the similarity between the ADEA requirement that charges alleging age discrimination be filed with appropriate State agencies and the title VII requirement of deferral of appropriate charges to State and local agencies. Based on this similarity and previous rulings under title VII, the court held that the referral requirements of the ADEA were mandatory.

[4] The act was amended in 1978 to change the "notice of intent to sue" language to "charge."

Transfer of ADEA enforcement authority to the Commission represented the considered judgment of the executive, with which Congress concurred,[6] that the fragmented nature of the Federal civil rights enforcement process worked a hardship on protected class members and the respondent community. Duplication of effort, inconsistency, and burdensomeness were frequently cited as major shortcomings of the Government's enforcement program and obstacles to the eventual elimination of discriminatory employment systems. Thus, the reorganization plan envisioned transfer of ADEA responsibility[7] as a means to insure a more uniform and consistent approach to the Government's enforcement activities. While the reorganization plan did not precisely mandate that the Commission import its title VII processing systems into ADEA enforcement, it is reasonable to conclude that some clearer focus on charge processing under the ADEA was contemplated. At the same time, there is no question that a continued emphasis on directed and/or "systemic" ADEA investigative activity was considered essential to uncovering and eliminating the serious inequities resulting from age-based employment discrimination.

The purpose of this report is to review and assess the manner in which the Commission has absorbed and discharged its new responsibilities under the ADEA. Of particular concern are questions relative to the Commission's charge processing and investigative systems; policy development; and litigation-related activities. A report of this nature, as well as continued and more extensive oversight, is especially timely for several reasons. First, there has been very limited congressional oversight of the Commission's ADEA enforcement activities to date. The House Select Committee on Aging held a 1-day hearing on the Commission's activities in 1980,[8] but that was limited largely to probing allegations of individual charging parties that the Commission had failed or refused to process their charges fairly or appropriately. While a number of programmatic questions were raised, with supplemental answers submitted by the EEOC, the process of developing procedures and policies at the Commission was still in its embryonic stage. It was simply not possible at that time to engage in comprehensive oversight activities. However, in light of the Commission's 3-year tenure with the ADEA, it is now both feasible and appropriate to make a reasoned assessment of the Commission's performance to date.

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[5] This staggering volume of charges resulted in the EEOC's notorious backlog which, by 1977, was in excess of 100,000 unresolved charges. As a part of its fundamental reorganization, the agency segregated these backlog charges and has applied concerted efforts to their resolution, while simultaneously utilizing a rapid charge processing system to remain reasonably current in its processing of new charges. As a result the old backlog has been virtually eliminated.

[6] The reorganization proposal was submitted to both Houses of Congress on Feb. 23, 1978: resolutions of disapproval, introduced in both Houses on February 24, were never approved. See exhibit 1.

[7] The reorganization plan also transferred jurisdiction over the Equal Pay Act, 29 U.S.C. 206(d), from Labor to the EEOC and responsibility for Federal sector equal employment opportunity enforcement from the Civil Service Commission.

[8] Hearing on EEOC Enforcement of the Age Discrimination in Employment Act before the House Select Committee on Aging, 96th Congress, 2d session (1980) (hereinafter, Hearings). See exhibit 2.

Second, there is compelling evidence that the incidence of age discrimination has increased dramatically over the past several years. Realistically, this phenomenon cannot be expected to abate of its own accord, given the depressed state of the economy. Thus, vigorous enforcement of the ADEA is essential to assure that older workers not bear the brunt of current adverse business conditions.

Third, while the age act was first passed in 1967 and amended in 1974 and 1978, there is still a surprisingly low awareness of its existence, prohibitions, and procedures.[9] Through oversight, the committee may ascertain the extent to which the Commission has made the ADEA and its own enforcement mechanisms both visible and accessible to members of the protected age group. Moreover, the committee will be able to determine whether a heightened awareness of the act can be achieved through more concerted efforts by the Commission or whether congressional action of some sort is necessary.

Fourth, there has been virtually no public or private monitoring of the Commission's ADEA activities. In July 1981, the Commission submitted to Congress its age discrimination report covering its activities during fiscal years 1979 and 1980; this report, while informative, was neither designed nor intended as a problem spotting or self-monitoring vehicle. Similarly, while the General Accounting Office has on a few occasions addressed specific issues relative to the Commission's ADEA enforcement, it has not undertaken any comprehensive review of the Commission's handling of its new jurisdictions.[10] Thus, none of the usual avenues of governmental monitoring have been fully utilized. Nor have the private advocacy groups directed substantial attention to the EEOC's ADEA enforcement activities. Working Women, a national organization of women office workers, published a report in 1980 which specifically addressed the dual problems of sex and age discrimination facing older women workers or new entrants to the labor force.[11] As part of its report, Working Women noted various deficiencies it perceived in the EEOC's program. As of this writing, however, apparently no other interest groups have engaged in ongoing monitoring of the EEOC's activities. By contrast, women's and civil rights groups have historically maintained a close watch on the EEOC's activities under title VII, thereby serving as effective watchdogs of the agency. This near-absence of either congressional or private monitoring of the EEOC could create a situation in which ADEA enforcement might languish. Thus, it is imperative that effective oversight be maintained on a continuing basis, and that private advocacy groups be encouraged to exert more vigorous and concerted efforts in this regard. This report should serve as a catalyst for both.

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[9] In a Louis Harris & Associates survey conducted in 1981 for the National Council on Aging, only 44 percent of the labor force surveyed knew of the existence of the ADEA; only 47 percent of the survey respondents between the ages of 55 and 64 knew of the act's existence. See Sheppard, "ADEA Awareness Varies Among Respondents," 4 Aging and Work 224 (published by National Council on Aging (1981)). In another survey conducted by the Department of Labor as part of its study to determine the impact of the 1978 ADEA amendments, only 10 to 15 percent of the employees surveyed were aware of the 1978 amendments and only 15 percent correctly identified the act's bar to mandatory retirement prior to age 70. DOL, "Interim Report to Congress on Age Discrimination in Employment Act Studies," at 6–9 (1981). See exhibit 3.

[10] The GAO conducted a review of age discrimination units in several district offices in 1981, but issued no written report pursuant to that review. In November 1981, the GAO issued a report, "Age Discrimination and Other Equal Employment Opportunity Issues in the Federal Work Force," in which it found problems in the processing of Federal sector complaints in general. It specifically found that age cases were accorded the same priority as all others and that age discrimination did not appear to be a uniquely severe problem in the Federal sector. Finally, in its comprehensive audit of the EEOC, dated Apr. 9, 1981, the GAO cursorily reviewed the transfer of the ADEA function to the Commission and commented that it had been accomplished fairly smoothly. "Further Improvement Needed in EEOC Enforcement Activities," GAO, 1981, p. 42.

[11] Working Women, "Vanished Dreams: Age Discrimination and the Older Woman Worker," at 21–26 (1980).

Finally, a new Chairman of the Commission was recently confirmed, assuming his position during the second week of May. This marked the first time in almost a year and a half that the Commission had a permanent Chairman.[12] While fiscal year 1981 was in many ways a banner year for Commission ADEA enforcement efforts,[13] it was also a period during which the Commission absorbed substantial budget reductions; functioned without its statutorily prescribed quorum for a 3-month period; and experienced extensive turnover in key management positions. These and various other factors have undoubtedly inhibited the Commission in undertaking new policy initiatives; they may also have had a negative impact on other aspects of enforcement not readily apparent from reported data. Since the new Chairman has now assumed his position at the agency, this is an ideal time to assess the strengths and weaknesses of the Commission's enforcement efforts and to highlight particular areas of concern which the Commission ought to address. In that regard, this report may play a role which is at once constructive and instructive.

Preparation for this report included the following activities:

—A thorough review and analysis of documents and other information submitted by the Commission in response to questions promulgated during the past few months (see exhibit 4 for copies of relevant correspondence).

—Extensive interviews and discussions with agency personnel directly involved in ADEA enforcement activities or responsible for overall management of the agency.

—A review of the extant literature on age discrimination to target individuals and organizations active with respect to age discrimination issues and to ascertain the nature and severity of age-based employment discrimination in general.

—Meetings and interviews with representatives of advocacy groups, employers, and unions.

—A summary review of the case law under the ADEA, with special emphasis on leading cases involving salient issues under the act.

Throughout the entire period of preparation, the staff of the EEOC has offered assistance, technical advice, and insights that were timely, useful, and of a consistently high caliber. Their efforts have greatly facilitated the preparation of this report.

Consistent with the overall objectives of the oversight process, this report is divided into sections which address specific issues and areas of concern. With respect to each such section, an EEOC "status report" is provided, followed by a discussion of relevant questions and concerns.

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[12] The former Chair, Eleanor Holmes Norton, resigned her position in February 1981. During much of the interim between her resignation and the appointment of a permanent chairman, the Commission was led ably by Acting Chairman J. Clay Smith, Jr.

[13] Various documents submitted to the committee by the Commission reflect substantial increases in benefits obtained for charging parties and numbers of lawsuits filed during fiscal year 1981.

Chapter 2

TRANSFER OF FUNCTIONS FROM THE DEPARTMENT OF LABOR TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Prior to the actual transfer of authority, the EEOC and Labor engaged in fairly extensive negotiations, culminating in the issuance of two memoranda of understanding (MOU) relative to the transition period. In addition, the EEOC and Labor cooperated in the development and publication of the amendments to the interpretative bulletin necessitated by the 1978 ADEA amendments.

The first MOU, signed in October 1978, addressed itself largely to issues affecting the transfer and training of personnel, the availability of enforcement files, and the manner and extent to which the agencies would cooperate in enforcement activities before and after the transfer.[14] Pursuant to the terms of the MOU, Labor Department staff were detailed to the EEOC to facilitate the transfer process. Orientation and training were provided for key supervisory personnel immediately prior to the actual transfer. During that period, the Department also undertook a comprehensive review of all pending ADEA cases and reduced the inventory of transferred cases to 867.

The second MOU was issued immediately prior to the transfer. It dealt with the division of responsibility as to the 61 lawsuits then pending under the ADEA. Pursuant to the MOU, the Department retained principal responsibility for 19 cases which were at a point in litigation or settlement negotiations which rendered transfer counterproductive. The remainder of the cases were transferred to the EEOC. The MOU committed the agencies to future cooperation with respect to pending litigation.

In terms of financial and personnel resources, the reorganization plan specified that a budget of $3.5 million and 119 positions (nationwide) were to be transferred to the EEOC for age enforcement.[15] According to the EEOC, "nearly half of the transferred positions, including most of the supervisory ones, were filled by former DOL employees."[16] However, a relatively small number of attorneys transferred with the function: only eight transferred nationwide, three in Washington and five in the field. The Commission engaged in extensive recruitment activities, and by the end of the fiscal year, nearly all of the positions allocated for ADEA enforcement had been filled.

From the outset, the EEOC established discrete units for processing ADEA and Equal Pay Act charges and complaints in each of the 22 district offices it maintains. In addition, ADEA/EPA units were established in four area offices—Boston, Pittsburgh, Kansas City, and Tampa—where high concentrations of ADEA charges were anticipated.[17] Through the first MOU, the Commission and Labor also provided for the continued filing of ADEA charges at the Wage and Hour field offices, with a subsequent transmittal of the charges to the appropriate Commission office.

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[14] See exhibit 1 for copies of the memoranda of understanding negotiated between the EEOC and the Department of Labor. See also, exhibit 5, containing EEOC's Fiscal Years 1979 and 1980 ADEA Report.

[15] White House fact sheet on Reorganization Plan No. 1, Feb. 23, 1978, p. 4.

[16] EEOC Fiscal Years 1979 and 1980 ADEA Report, p. S-2 (exhibit 5).

The agency experienced many of the problems which one might anticipate would accompany any transfer of authority, resources, and personnel. There apparently were some rather serious staff morale problems, which were exacerbated by the general lack of familiarity on the part of both EEOC and transferred Labor personnel with the statutes administered by each. While some orientation and training were provided, it may well have been inadequate. ADEA supervisors were trained in EEOC procedures and intake supervisors in ADEA and EPA statutory provisions and procedures prior to the transfer, but there was no formal headquarters training of field intake officers. Field investigators (equal opportunity specialists or EOS's) received only 4 days of ADEA training several months after the transfer.[18] While some of these investigators had transferred from Labor (and thus were familiar with the ADEA), about one-half of them were either new to the Commission altogether or were transferring into ADEA from other processing units. There was an expectation that district and area offices would provide more extensive, on-the-job training to both intake and investigative EOS's but there was no formal program which either facilitated or mandated local training. Nor is there any indication that such training occurred on any sort of widespread basis. Rather, the quantity and quality of such training varied dramatically from one office to another. With respect to lawyers, the agency was already engaged in providing an intensive trial advocacy skills training program; a focus on ADEA litigation was incorporated into that program.

In terms of the cooperation and coordination between EEOC and the Department of Labor, several observations may be made. First, it is clear that litigation enforcement activities suffered a shortfall during fiscal year 1979. The Department filed only nine new lawsuits from September 30, 1978 to the transfer in July 1979. In the last quarter of fiscal year 1979, the Commission filed 16 suits, most of which had been developed by the Department of Labor. The Department apparently consciously limited the numbers of suits it initiated in order not to preclude the Commission from developing its own litigation strategy. This problem of litigation shortfall was, fortunately, temporary and was corrected the following year, when the Commission filed 52 ADEA lawsuits.[19]

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[17] Subsequently, the Commission has assigned some ADEA processing staff to other area offices as well, though no separate ADEA units have been established. Each of the Commission's district and area offices is available for intake of all charges under the ADEA. However, the total number of EEOC compliance offices—49—is substantially lower than the 300-plus area offices and field outposts from which DOL operated its ADEA program.

[18] Information as to ADEA training is contained in the Hearings, supra, footnote 8, at 101. Additional updated information was submitted on Apr. 1, 1982, and is contained in the correspondence between the Commission and the committee, exhibit 4 (memorandum to Edgar Morgan from Martin Slate, re: Proposed responses to questions of Senator Heinz). There are some inconsistencies in these two reports on training. In particular, the information provided in the Hearings specified that basic title VII compliance training was offered to DOL transferees from Aug. 13, 1979 to Aug. 24, 1979. The training information submitted to this committee and contained in exhibit 4, however, specified that from Aug. 13, 1979 to Aug. 17, 1979, training in ADEA procedures was offered. Based on conversations with EEOC staff, it appears that the latter information is accurate.

[19] See exhibit 4, letter from Edgar Morgan to Michael Batten, Oct. 30, 1981; see also, exhibit 6, Fiscal Years 1980 and 1981 General Counsel Annual Reports.

Second, there was substantial concern on the part of many—including Members of Congress—that the reduction in numbers of offices available for charge processing would impact negatively on potential complainants. The agreement between the Commission and Labor that charges could be filed at regional offices of the Wage and Hour Division was designed in part to assuage these concerns. Notwithstanding the agreement, however, only a minimal number of charges were actually transmitted from the Labor Department field offices to the EEOC. This result may have occurred simply because Labor officials counseled charging parties verbally that they were to file their charges with the EEOC; in that case, the rights and interests of charging parties were not affected. The dearth of written charges transmitted from Labor to the EEOC, however, indicates that for all practical purposes there was no ongoing coordination or formal relationship between the agencies after the transfer.

In addition to these problems, several others which surfaced during the transition period impeded the Commission's ability to absorb the ADEA enforcement function as effectively and efficiently as it might have. The Commission consciously chose to utilize existing Labor Department procedures for the processing of ADEA charges during the transition period. This decision generated a substantial amount of confusion. Many of the transferred-in Labor personnel complained that the Commission's unfamiliarity with the ADEA itself and the existing procedures posed obstacles to their efforts to investigate. On the other hand, complainants and respondents expressed consternation and concern about the processing differences between title VII and the ADEA.[20] The Commission finally took steps to correct this problem in the fall of 1980, when it established an in-house task force to develop procedural regulations, compliance manuals, and processing systems for ADEA enforcement. However, the procedural compliance manual was not formally approved and disseminated to the field until November 1981; drafting of an interpretative compliance manual, providing substantive guidance, has only recently begun. And the agency's procedural regulations, first published in proposed form on January 30, 1981, have yet to be approved and published in final form, despite the fact that no major revisions in the proposed regulations are contemplated.[21] In addition, even though the Commission has now provided processing instructions to its field offices requiring them to adopt a modified version of title VII processing procedures for ADEA enforcement, the anticipated date by which all offices would in fact have adopted those procedures was the end of the first quarter, fiscal year 1982. Thus, until recently, variation in procedures has continued not only among the different statutes [22] enforced by the Commission, but among district offices as well.

The Commission also experienced what it considered to be an unexpectedly large increase in ADEA charge intake during the latter part of fiscal years 1979 and 1980.[23] As a result, virtually all of the Commission's ADEA resources were devoted to individual charge processing, at direct expense to a significant program of ADEA directed investigative activity. More careful advance planning and coordination would have enabled the Commission to project its ADEA charge intake more accurately. In particular, had the Commission taken into account the differences in charge intake and recording procedures it used compared to those used by Labor, a significant increase in charge filings might well have been anticipated. For example, the Commission indexes and counts charges under any statute by charging parties. Labor, on the other hand, indexed and counted charges by respondents. Thus, a particular practice—e.g., the discharge of 30 older workers by a single employer—would give rise to higher number of charges at the Commission than at Labor (i.e., 30 individual charging parties and charges at the Commission compared to one charge—indexed by the employer's name—at Labor). Had the Commission taken these and similar variations in procedures into account, it could have more accurately projected its ADEA charge intake and developed strategies for engaging both in directed activity and individual charge processing.

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[20] See Hearings, supra, footnote 8, at 9–17.

[21] See exhibit 8, memorandum from Michael Connolly, General Counsel, to SCEP (Staff Committee on Employment Policy), Mar. 11, 1982, recommending final approval of proposed procedural regulations.

[22] Some of these differences are mandated by the language of the statutes. Title VII, for example, requires that respondents be notified of charges within 10 days. It also requires that prior to filing suit, a charging party must obtain a notice of right to sue from the Commission. The ADEA, on the other hand, imposes far fewer procedural requirements on either the Commission or complainants.

Finally, the EEOC was handicapped in its assumption of the ADEA function by the serious inadequacy of resources transferred to it by the reorganization order. From the outset, the Commission devoted staffing and resources far in excess of the $3.5 million and 119 positions transferred from Labor. In part, this resulted from the fact that no separate travel authorization was transferred to the Commission for the ADEA function. Thus, the Commission had to absorb these expenses through its then-existing travel authorization. In addition, the increase in charge filing necessitated the deployment of title VII staff into ADEA processing units during both fiscal years 1980 and 1981.[24] In its fiscal year 1982 budget request, submitted to OMB in September 1980, the Commission specifically requested enhanced funding for the ADEA and EPA functions (but not the title VII function) in order that it might better meet the demands placed on it by the new jurisdictions; OMB, however, denied the request.[25] To the Commission's credit, despite funding and personnel shortfalls, the compliance staff allocated for the ADEA function has increased each year since 1979; by contrast, the title VII staff allocation has declined.[26] Moreover, the fiscal year 1982 budgetary allocation for the ADEA enforcement program is $14,640,000—a 300-percent increase over the fiscal year 1979 allocation transferred to the Commission.[27] This continued and substantial growth in resources earmarked for ADEA charge-processing activities dispels any notion that the Commission accords ADEA charge resolution activities a priority lower than its title VII charge resolution function. But these figures also illustrate rather dramatically that the appropriation originally transferred was simply inadequate.

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[23] See EEOC Fiscal Years 1979 and 1980 ADEA Report, p. III–1 (exhibit 5).

[24] Id., at III–3. The fiscal year 1982 budget submission to OMB also noted the deployment of title VII staff to age processing.

[25] EEOC Fiscal Years 1979 and 1980 ADEA Report, id. The Commission, however, did receive an increased appropriation in its separate State and local appropriation to begin contracting with State agencies for the resolution of ADEA charges. See infra.

[26] See appendix IV. Commission officials, however, point out that these figures are estimates.

[27] Ibid.

Summarizing, then, the transition period was characterized by several problems, some of which might have been avoided through more careful and thoughtful advance planning. While staffing was completed fairly promptly, training should have been more extensive and formalized. Directed investigations were not accorded sufficiently high priority and there was a disproportionate commitment of resources to individual charge processing. To a large extent, the problems encountered by the Commission may be attributed to the inadequacy of resources it received for the ADEA function. However, the delay in beginning to develop procedures, coupled with the subsequent delay in finalizing those procedures, undoubtedly also hampered the Commission's efforts to gain control of the ADEA function.

Chapter 3

CURRENT ADMINISTRATIVE ENFORCEMENT FUNCTIONS

EEOC compliance efforts under the ADEA involve a combination of administrative processing and investigation of individual charges; the initiation of directed investigations; and litigation of a limited number of cases where attempts to resolve findings of violation voluntarily through conciliation fail. This section discusses the structure and function of the administrative compliance units; the litigation program is discussed in chapter 4.

A. Organizational Structure

The administrative compliance functions of the agency are managed through the Office of Field Services in headquarters, with actual compliance activities accomplished by the age units in district and area offices.[28] In addition, beginning in the latter part of fiscal year 1981 and continuing into fiscal year 1982, the Commission has contracted with a number of State agencies for the resolution of certain numbers of ADEA charges filed concurrently with State and Federal agencies.

HEADQUARTERS

The Office of Field Services' structure for ADEA enforcement parallels that which the Commission has established for title VII. Thus, within Field Services there are three divisions that have direct age responsibilities. Principal among these is the Age and Pay Unit within the Division of Technical Guidance. The Age and Pay Unit is responsible for developing procedures for charge processing; providing technical advice with respect to various substantive issues raised in processing; and periodically reviewing case files from district/area office age units to make qualitative assessments of the offices' enforcement activities. In addition, because the agency has not established discrete units for policy development and systemic enforcement in age (as it has in title VII), the Age and Pay Unit personnel are also extensively involved in these functions. (See pages 36 and 59 for discussions of systemic enforcement and policy development.) Staffing in the Age and Pay Unit currently consists of one supervisor, responsible for both age and pay,[29] three full-time age professionals and one professional identified as a full-time age specialist but who actually now works at least part time in another unit.[30]

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[28] An organizational flow chart is reproduced in Hearings, supra, footnote 8, at 70–74. See also exhibit 7, EEOC–ADEA staff—Washington, D.C. and field.

[29] See exhibit 7, supra, footnote 28. Two supervisors—one for ADEA and one for EPA—originally transferred with the functions. The ADEA supervisor returned to DOL in December 1980. His position was subsequently abolished and the remaining supervisor was assigned responsibility for both units.

[30] As of this writing, one GS–12 worked only part time in ADEA.

The Field Management Unit of the Office of Field Services has two management level employees designated as age/pay specialists. Their function is to review charge intake, productivity, and staffing in district and area offices, to determine whether movement of staff to correspond to charge flow is necessary. Through their regular monitoring of charge flow and productivity, they engage in problem-spotting and develop "improvement projects" designed to remedy the problems they uncover. By the end of fiscal year 1980, for example, they had identified two especially acute problems in age: first, the nationwide inventory of unresolved ADEA charges was 8.2 months, with eight offices having inventories in excess of 1 year;[31] and second, eight offices failed to meet the processing assumption of 80 charge resolutions per EOS annually, though only three were substantially below that figure. Both of these problems, which are obviously interrelated, are of particular concern in the ADEA area because of the statute of limitations applicable to lawsuits under the act.[32] To remedy the problems, the Field Management staff worked with the targeted offices to develop problem-specific improvement projects. As a result, by the end of fiscal year 1981, the nationwide inventory had decreased to 7.7 months. Individual office inventory reduction projects were virtually all successful, though several which were begun late in the fiscal year have been continued into fiscal year 1982. Productivity on a nationwide level increased substantially, with a corresponding improvement in those offices targeted through the improvement projects.

Monitoring of field offices' activities is also conducted by the Operations Evaluation Division, the internal audit arm of Field Services. OED's audits focus on the manner and extent to which field offices comply with established agency procedures in their charge processing activities. Historically, these audits have not been designed to measure the qualitative nature of enforcement activities; rather, they are the mechanism for seeking to assure the uniform application of procedures nationwide. OED audits of field offices ideally are conducted on an annual basis. However, several scheduled for the remainder of this fiscal year have recently been canceled, presumably for budgetary reasons.[33] The Age and Pay Unit staff were principally responsible for developing the ADEA/EPA review modules used by OED in its audit. In addition, a staff member of the Age and Pay Unit frequently accompanies OED auditors, in order to review the field offices' compliance with age procedures.

The agency's Training Division is also located within the Office of Field Services. Its current staffing level is approximately 15 positions. In EEOC budget submissions to OMB for fiscal years 1979 and 1980, proposed staffing for the Training Division was broken out separately for title VII, Federal Complaints, and ADEA/EPA.[34] indicating that Training Division personnel would develop ADEA training materials. In subsequent budget submissions, only a total figure was provided; there was no breakout for personnel according to statutory function. In fact, all training materials for ADEA and EPA are prepared by the Age and Pay Unit. The Training Division apparently only prepares title VII training materials.

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[31] "Inventory" means the amount of time which would be required to process all charges in the system were all intake of new charges to cease.

[32] The ADEA requires that suits be filed within 2 years of the alleged discriminatory action, unless the violation is willful, in which case the statute of limitations is 3 years. Title VII, by contrast, contains no statute of limitations though it does provide that private plaintiffs must file suit within 90 days of receiving their notices of right to sue from the Commission.

[33] At this writing, the committee does not know which audits were canceled, or whether any of the offices involved have ADEA problems.

[34] These figures were merely estimates for budgeting purposes. They rarely, if ever, correspond to actual staffing levels.

FIELD ORGANIZATION

The EEOC maintains 49 field offices, responsible for intake of charges, investigations, and the bulk of the Commission's litigation.[35] There are 22 district offices, providing the full range of Commission services: intake, factfinding, full investigation, systemic targeting under title VII, and litigation.[36] Each of these district offices maintains an ADEA unit, with compliance professional staffing that ranges from three to nine full-time investigators, depending on ADEA caseload (or concurrent ADEA/title VII charges), caseloads under other statutes, and availability of resources.[37]

There are 27 area offices, which offer a limited range of services. All are available for intake of charges under any of the Commission's jurisdictions; in addition, most have title VII factfinding units. However, only four—Boston, Kansas City, Pittsburgh, and Tampa—have ADEA units. Greensboro, El Paso, and San Antonio each have one EOS assigned to process age charges. All other area offices transmit the age charges which they receive to the appropriate district office for processing.

In each office—district or area—the age processing units have been maintained distinct from the title VII function since the Commission assumed the ADEA jurisdiction. The Commission consciously opted for this structure in order to assure the development of a high level of expertise in ADEA processing and to guarantee that problems in age processing could be readily targeted and addressed.

B. ADEA PROCESSING PROCEDURES

Appendix 1 contains detailed synopses of the documents which the Commission has published prescribing its processing methodology (see exhibit 8 for background documents). Included are summaries of an ADEA case processing procedures paper, N-915 (published on January 29, 1981); the proposed ADEA procedural regulations,[38] 46 F.R. 9970 (January 30, 1981); and the ADEA compliance manual [39] (approved November 1981).

As noted supra, the Department of Labor did not direct its enforcement resources to individual charge processing. The Commission, however, has increasingly made such processing the focus of its attention. In addition to this focus on individual charge processing, the Commission's procedures represent a departure from those utilized by the Department of Labor in several other significant respects.

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[35] See exhibit 7, supra, footnote 28, for a breakdown of district office ADEA personnel. Appendix V reflects all district and area offices with ADEA staffing.

[36] Prior to the agency's reorganization in 1979, it maintained separate compliance offices and five regional litigation centers. These offices were merged nationwide in January 1979.

[37] Many of the district offices have combined ADEA/EPA units or designated one supervisor for both ADEA and EPA. See appendix V.

[38] Supra, footnote 2.

[39] The compliance manual prescribes processing procedures only. The Commission has just recently begun to develop an ADEA interpretative manual for use by its field investigators.

First, they are more formal. The procedural regulations, if published in final form, will be the first such regulations ever published under the ADEA. They reflect the Commission's intent to formalize the ADEA enforcement process and, where feasible and appropriate, to make it consistent with that used in title VII enforcement.

Second, the ADEA Compliance Manual and Procedural Regulations provide for the issuance of a formal written letter of violation, upon completion of an investigation. The language of the procedural regulations—"[w]henever the Commission * * * conclude[s] that a violation * * * has occurred * * * it *may* issue a violation letter"[40]—indicates that issuance of such a letter is discretionary; and the regulations specify that failure to issue the letter *does not* signify that the Commission has found no violation. Issuance of the letter, however, does reflect the Commission's determination that the case is "litigation-worthy," i.e., that it is one in which either the Commission or a private plaintiff would be likely to prevail were it to sue.[41] Thus, failure to issue the letter presumably signifies that the Commission will take no further enforcement action. The Department of Labor never issued such formal letters of violation.

Third, because of the Commission's emphasis on resolving substantial numbers of individual charges through early conciliation efforts, the investigative strategy has shifted from fairly comprehensive onsite reviews to face-to-face conferences between charging parties and respondents, presided over by a Commission representative.[42] This "factfinding" enforcement mode, discussed in greater detail on page 27, places the Commission EOS in the role of mediator. Charges are often resolved with only a very cursory investigation, coupled with a strong emphasis on settlement.

Finally, through its proposed procedural regulations, the Commission is attempting to clarify and possibly restrict the applicability of the Portal-to-Portal Act defense incorporated into the ADEA through section 7(e)(1).[43] Section 10 of the Portal-to-Portal Act creates a bar to a finding of violation where

> [T]he act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, [of the Commission] * * * or any administrative practice or enforcement policy * * * with respect to the class of employers [involved].[44]

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[40] Proposed procedural regulations, 29 C.F.R. 1626.14(b) [emphasis added]. See appendix 1 and exhibit 8.

[41] This concept of litigation-worthiness was established in 1977 as the standard the agency would apply to determine whether to issue "cause" letters of determination in title VII cases. There has been some concern and confusion about what the standard in fact signifies, with many EEOC staff personnel expressing the opinion that field lawyers—who make the initial assessment of litigation-worthiness—confuse the question of litigation-worthiness with the question of whether the agency will sue. Since a cause finding is not a prerequisite to suit under title VII and clearly not a prerequisite under the ADEA, application of the litigation-worthiness standard does not adversely affect the legal rights of private plaintiffs. However, there is some concern that imposition of the litigation-worthiness standard on ADEA investigations may result in an inability to negotiate settlements on the compliance side, with respondents intentionally prolonging settlement discussions to see whether the agency will, in fact, issue a letter of violation.

[42] Because of restrictions on travel resources, the Commission actively discourages onsite reviews. By contrast, the higher number and greater geographic dispersion of DOL offices made onsite investigations far more feasible. Indeed, onsite investigation was the Department's principal enforcement mode.

[43] 29 U.S.C., 259.

[44] Ibid.

Since the Department of Labor never published any procedural regulations which defined the scope of this defense, its applicability was determined on a case-by-case basis. In its proposed procedural regulations, however, the Commission has stated that the defense may be raised only where the respondent has sought and obtained a formal "opinion letter," signed by the General Counsel on behalf of the Commission; or has relied upon matter published in the Federal Register and designated as an opinion letter(s).[45] Through this provision, the Commission has signaled its attempt to prescribe rather precisely the circumstances under which a respondent may raise the defense. While this approach may be somewhat more restrictive than that of Labor, it has the virtue of establishing clear standards where none previously existed.[46]

The processing procedures finally adopted by the Commission borrow largely from title VII procedures, while preserving some of the major distinctions between the two statutes. The ADEA imposes only two requirements on the Commission: That it "promptly" notify respondents against whom charges are filed and attempt to resolve charges through informal and voluntary negotiations; and that, upon a finding of violation, it again attempt conciliation prior to the institution of a lawsuit. Thus, unlike title VII, the ADEA does not impose upon the Commission a requirement that it investigate and issue determinations with respect to each charge it receives. This absence of statutorily mandated procedures, combined with a clear grant of discretionary authority under section 7(a) to initiate its own investigations, enabled the Commission to develop three basic enforcement approaches. The procedure actually used for processing an ADEA charge depends on the nature of the charge or charging party and the availability of resources.

Certain charges are processed through "*settlement attempt only.*" These include charges in which it is clear that there is no violation; the charging party's attorney firmly indicates that s/he intends to file a private civil action; or the requested relief is far in excess of that to which the charging party is entitled or so minimal as to render extensive use of Commission resources for processing inefficient. All charges are subjected to at least this level of processing.[47]

The overwhelming majority of charges are processed through *factfinding*, a combined settlement-investigative approach which is designed to resolve as many charges as possible reasonably quickly and provide enough information with respect to others to enable the Commission to determine whether further investigation is appropriate. The agency's objectives are to process 80 percent of its ADEA cases in factfinding within 150 days, with settlement rates running at about 23 percent.[48] Factfinding usually consists of a request for information submitted to named respondents, followed by a face-to-face conference between the charging party and respondent, with a Commission EOS presiding. Factfinding is generally suitable only for resolution of charges which clearly involve only one individual or a small number of individuals. The Commission's policy is that charges which involve potentially large numbers of affected persons, extensive relief, or industries or issues targeted for intensive review should not be processed through factfinding, but rather should be subjects of full investigations. As noted supra, the Commission did not anticipate that its processing procedures would be fully operative in all of its field offices until January 1982. As of this writing, it appears that factfinding is in fact used as the principal mode of processing by all EEOC offices.

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[45] See appendix 1, 29 C.F.R. 1626.17 (a) and (b). See also, exhibit 8.

[46] Some commentors have suggested that the EEOC has unnecessarily restricted the scope of the defense. Indeed, they argue that the Commission's position may well not be sustained by the courts.

[47] Charges which are clearly nonjurisdictional, e.g., filed by an individual not within the protected age group, are closed without any settlement attempts.

[48] See exhibit 8, ADEA case processing procedures, p. 7.

Charges not resolved in factfinding are closed or targeted for *more extensive investigation.* Other cases targeted for full investigation include those which, on the basis of information supplied at intake, are identified as raising issues appropriate for full investigation, as well as those in which the Commission has initiated directed activities. The following issues are deemed appropriate for full investigations: Denial of or reduction in employee benefits not justified on a cost-to-employer basis; reductions in force or layoffs which disproportionately affect older workers; reorganizations; and hiring and promotion criteria which have an adverse impact on older workers.

The Commission projects that because of limited resources, no more than 20 percent of an office's caseload will consist of full investigation. The Fiscal Year 1982 Management Plan provides that with respect to directed investigations:

> Offices should initiate directed investigations only when workload permits additional investigations in accordance with resources (staffing and processing assumption considerations) or where it is determined that litigation referral is best served in this manner.[49]

In addition to these limitations on numbers of investigations, the Commission also specifies that

> [E]very effort should be made to conduct an investigation without visiting the respondent's place of business.[50]

These limitations not only reflect the resource shortage which hampers the Commission's investigative activities, but also the conscious choice made by the Commission to focus available resources on individual charge resolution as opposed to more extensive investigative activity of a more limted number of charges.

C. PERFORMANCE EXPECTATIONS AND EXPERIENCE

The Commission attempts to assure a high level of performance and accountability through its management accountability system. Management accountability plans (MAP's), with performance indicators and goals, are developed annually by each office on the basis of program guidance developed by headquarters. Quarterly reports are submitted to demonstrate the extent to which field offices have met their MAP goals. (Exhibit 9 contains copies of the Annual Program Guidance, Fiscal Years 1981 and 1982 Management Plan/Financial Plan.)

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[49] See exhibit 9, Fiscal Year 1982 Management Plan, p. 30.
[50] See exhibit 8, ADEA Case Processing Procedures, p. 11.

Appendix II shows the performance indicators, expected levels of achievement (ELA's),[51] and processing assumptions applicable to ADEA, title VII, and the EPA. The most salient performance indicators and ELA's originally established for *age* in fiscal year 1982 were the following:

Percent closures with benefits	25
Average monetary benefit per settlement	$7,500
Average processing time of charges closed in unit (days)	150
Percent charges in unit over 180 days	35

Effective April 1, 1982, the performance indicator for average monetary benefit per settlement was eliminated. While that figure will continue to be reported as an "operating statistic," it will no longer be utilized as a measure of performance or as an incentive.

It is difficult to determine precisely how these performance indicators and ELA's for ADEA charges correspond to those established for title VII. As reflected in appendix II, title VII is broken down into three units: factfinding, continued investigation and conciliation—early litigation identification (CIC–ELI), and continued investigation and conciliation—other (CIC–other). Processing assumptions are established separately for each of these units under title VII, while only one processing assumption is established for all ADEA charges. Thus, the single processing assumption for age is 90 charge resolutions per EOS per year. For title VII, the figures are 90 charge resolutions per EOS in factfinding; 70 per EOS in CIC–other; and 5 litigation referrals per EOS in CIC–ELI.[52] Similarly, the "average processing time" performance indicator for ADEA charges is 150 days;[53] for title VII, it is 110 days for charges in factfinding and 150 days for charges in continued investigation. Charges in the ADEA unit may be resolved either through factfinding or continued investigation; actual performance defined as the total number of charges processed by each EOS is, of course, dependent on the processing mode selected.

In terms of actual performance, the Commission submitted several documents for fiscal years 1980 and 1981 which showed, inter alia, numbers of ADEA charges and/or concurrent ADEA/title VII (or ADEA/EPA) charges filed; directed investigations initiated; total closures; conciliations/settlements; benefits; and unresolved charges (i.e., inventory) under each statute at the end of fiscal year 1981. (See exhibit 10.) Although the information was provided on an office-by-office basis, it was not provided in a format which lends itself readily to a precise calculation as to actual performance by each office. In addition, the reporting format differed somewhat between fiscal years 1980 and 1981, thereby rendering an accurate assessment of the degree to which performance has improved somewhat difficult (see also discussion on calculation and reporting of benefits, page 42). Appendix III reflects a nationwide breakout of this information. It shows that charge filings under the ADEA increased from 5,374 in fiscal year 1979, to 8,779 in fiscal year 1980, and 8,101 in fiscal year 1981. Title VII charge filings rose from approximately 36,900 in fiscal year 1979 to 45,382 in fiscal year 1980, and 44,992 in fiscal year 1981.[54] Thus, age charges have grown in proportion to title VII charges from (approximately) a 15-percent figure in fiscal year 1979 to 19 percent in fiscal year 1981. This presumably reflects the increasing awareness of the ADEA's prohibitions, as well as the policy of the EEOC to counsel title VII charging parties within the protected age group of their ADEA rights. This counseling is also reflected by the fiscal year 1981 figure of 2,241 charges filed concurrently under ADEA and title VII (with an additional 79 filed alleging ADEA/EPA/title VII violations).

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[51] "Performance indicators" are defined as program unit indicators for which annual and quarterly goals are set. "Expected level of achievement" means the performance levels established for selected performance indicators which provide guidance for anticipated achievement based on prior experience.

[52] Processing assumptions are not performance standards but rather are based on projections of the average caseload which an EOS is presumed to be able to handle.

[53] Actual processing time may in fact be shorter; this figure refers to average number of days in unit.

The total number of directed investigations initiated declined from 663 in fiscal year 1979 to 200 (or less, see page 34) in fiscal year 1980, to 84 in fiscal year 1981. Successful settlements rose from 1,270 in fiscal year 1980 to 1,787 in fiscal year 1981, with a corresponding increase in total closures from 6,488 in fiscal year 1980 to 7,864 in fiscal year 1981. It is not possible to determine, on the basis of the information provided, the percentage of closures per processing mode; thus, the percentage of closures resulting from full investigations is not discernible. Benefits rose from $12,312,000 in fiscal year 1980 to $28,031,000 in fiscal year 1981.[55] The only figures available for inventories of unresolved charges were for fiscal year 1981. They showed that as of September 30, 1981, there was a nationwide inventory of 46,404 unresolved title VII charges; 6,369 ADEA charges; and 2,023 EPA complaints.

While the documents submitted to the committee cannot be utilized in their present form to determine productivity, interviews with EEOC staff did provide relevant information in that regard. They stated that productivity was high, with a national average of 97 cases per EOS. At the same time, fiscal year 1981 ended with a 7.7 month inventory of unresolved ADEA charges; this was a decrease from the fiscal year 1980 figure of 8.2 months.

The staff interviewed also noted that they are currently assessing fiscal year 1982 intake to date, as well as existing inventories, to determine whether staffing changes are necessary at this time.

D. ADMINISTRATIVE STAFFING AND RESOURCES FOR ADEA

ENFORCEMENT: STAFFING

In addition to the headquarters personnel involved in the administrative side of compliance activities under the ADEA, the Commission states that it currently has approximately 128 age compliance professionals scattered throughout its field offices. This represents an increase from a 108 figure in fiscal year 1979 and 122 in fiscal year 1980. By contrast, title VII staffing currently consists of approximately 1,208 compliance professionals, down from 1,247 in fiscal year 1980 (the fiscal year 1979 figure was 1,212). The *projected staffing* for fiscal year 1982 was 1,134 title VII positions, 131 ADEA positions, and 96 EPA positions.[56] Thus, title VII compliance staffing has shown a rather steady decline while ADEA staffing has increased. At the same time, however, the proportion of ADEA staffing to title VII is projected for only slightly more than 10 percent (see appendix IV). Indeed, the ratio may be even lower. Relying upon the figures in appendix IV and the supporting data upon which they are based (exhibit 7), it appears that the current total figure of 128 ADEA positions includes some offices which have a combined age/equal pay unit and/or have one supervisor for both age and equal pay. If so, the total number of compliance professionals devoting *full time* to age enforcement is less than 128. On the basis of this data, it thus appears that there is understaffing in the age enforcement area relative to title VII: ADEA enforcement staff equals 10 percent of title VII staff, while ADEA intake has grown to 19 percent of title VII. More precise and carefully tailored information on intake and staffing is necessary before a final determination may be made as to the extent of understaffing in the ADEA area.

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[54] Different sources often were inconsistent as to actual agency intake experience. Thus, some of these figures might not be precisely accurate. They also reflect EEOC charge intake only.

[55] These benefits figures were lifted from the EEOC Mission magazine, vol. 10, No. 1, 1982, p. 12 (exhibit 5). It is not clear how these correspond to those listed in the item entitled ADEA benefits fiscal year 1981 in exhibit 10. That item shows total awards to individuals in the amount of $16,641,486, of which the Milwaukee district office accounted for $13,938,637. Other monetary benefits in the form of "wage/salary restored," "pension restored," and "insurance restored," are included. These do not total the $28,031,000 figure cited in Mission.

[56] See appendix IV. Committee staff was orally advised that the actual current field compliance staffing consists of 1,256 positions. A new fiscal year 1983 ceiling has recently been set at 1,136 positions.

BUDGET

The Commission is a heavily staff-intensive agency. Nearly 80 percent of its budget is for personnel compensation and related expenses. Thus, it does not apportion its funds according to enforcement function. Based on its current and projected staffing, however, the agency calculated that its resources are apportioned among enforcement programs in the following manner:

	Positions (percent)	Amount
Title VII	73	$86,060,000
ADEA	12	14,640,000
EPA	7	8,540,000
Federal sector	8	9,760,000
State and local		[1] 18,000,000

[1] Appendix IV. Total funding and staffing ceilings for the Commission for the past several years have been: Fiscal year 1979, $106,750,400, 3,627 positions; fiscal year 1980, $119,000,000, 3,654 positions; fiscal year 1981, $137,875,000, 3,612 positions; fiscal year 1982, $144,737,000, 3,376 positions.

This projected distribution of resources, again, does not correspond precisely with actual charge intake experience. In fiscal year 1981, total intake was 58,754 charges, of which approximately 16 percent [57] were filed under ADEA; 81 percent under title VII; and 2 percent under the Equal Pay Act. Since these allocations are admittedly estimates, it is inappropriate to conclude on the basis of them alone that the Commission is underfunding its ADEA enforcement program relative to either its title VII or EPA program. However, because the deviation between proportion of workload and estimated funding is not insignificant, it would be appropriate for the Commission to examine its funding relative to caseload and then to supply more precise, carefully tailored followup data.

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[57] See Mission, p. 12 (exhibit 5).

E. TRAINING OF EEOC STAFF

The EEOC maintains a Training Division within its Office of Field Services which is responsible for development of training materials to be utilized on a nationwide basis. As noted on page 25, the Age and Pay Unit of Field Services has actually prepared all of the ADEA training materials; in addition, staff members from this unit in conjunction with field compliance officers conduct all of the ADEA training sessions. There is no age expertise within the Training Division per se.

Most of the training programs conducted with respect to any of the agency's authorities are held either in headquarters or offered on a regional basis. While training materials are designed in such a manner that they could be used by local offices for in-house training, in fact any such training is largely at the discretion of the individual office. There is no information currently available to the committee which would indicate the extent to which individual offices have developed their own in-house training programs.

The following table provides a breakdown of training provided ADEA compliance personnel from January 1, 1979 (prior to the transfer) until April 1, 1981.

TRAINING IN AREA ADMINISTRATIVE COMPLIANCE

Date	Class of trainees	Number trained	Subject of training
1979:			
Mar. 8, 9	ADEA supervisors; Department of Labor headquarters ADEA personnel.	40	EEOC procedures.
June 4 to 8	Intake unit supervisors	32	ADEA and EPA statutory provisions and procedures.
Aug. 13 to 17[1]	Field EOS's assigned to ADEA unit; half were DOL transferees and half were new employees, or title VII EOS's reassigned to age.	50	ADEA procedures.
Oct. 15 to 19	Field EOS's assigned to ADEA unit; new hires or transferees from other units.	22	Do.
1980: June 1 to 13[1]	Supervisors		
1981:			
Feb. 2 to 13	Field EOS's assigned to ADEA units; new hires or transferees from other units.	34	Do.
Sept. 21 to 25	Field EOS's assigned to ADEA unit; mostly transferees from other units.	23	Revised ADEA procedures.
Nov. 2 to 6	ADEA supervisors	22	New ADEA Compliance Manual procedures; update on policy and litigation.
1982: Feb. 2 to 5 (Washington) Feb. 8 to 12 (San Francisco).	Intake supervisors	48	New ADEA procedures.

[1] See footnote 18.

Base documents: Hearings, exhibit 2. Training information, exhibit 4.

As of the date this table was prepared, there apparently had been no training of title VII EOS's in ADEA procedures; nor does it appear that there had been training of ADEA EOS's in title VII procedures.[58]

F. Contracts and Work-Sharing Agreements With State Fair Employment Practices Agencies

In addition to direct enforcement activities undertaken by its field offices, the Commission also currently contracts with 25 State agencies for the processing of ADEA charges.[59] This contracting program is modeled after the Commission's successful State and local program under title VII. Both the ADEA and title VII require that charges be filed with appropriate State agencies, as well as the EEOC,[60] and both clearly contemplate a certain amount of coordinated effort by State and Federal agencies to enhance enforcement efforts and eliminate duplication and inconsistency. The Commission's program of contracting with State agencies is entirely new under the ADEA, having been instituted for the first time by the EEOC in fiscal year 1981. Although Labor occasionally engaged in some cooperative efforts with State agencies, it never entered into any formalized contracting or work-sharing agreements.

The Commission enters into a charge resolution contract and work-sharing agreement with each contracting agency (see exhibit 11 for listings of the State agencies with which the Commission contracts and copies of relevant contracting documents). The contracts provide that the State agencies will process an agreed-upon number of charges during the fiscal year, including charges transmitted from the EEOC as well as a portion of their own workloads. The State agencies are reimbursed $375 for each charge resolution within the previously established figure.

The decision as to numbers of charges for which to contract generally correlates with the concentration of charges within the EEOC office to which the State agency would report. For example, among the fiscal year 1982 contracting agencies, New York, Massachusetts, Pennsylvania, Minnesota, and Wisconsin accounted for over one-third—1,031 of the total 2,826—contracted for charge resolutions. Similarly, the New York district office (and its Boston area office) of the EEOC, the Milwaukee district office (and its Minnesota area office), and the Philadelphia district office (with its Pittsburgh area office) had the highest intake of ADEA charges filed with the EEOC during fiscal year 1981. There is, however, no perfect correlation along these lines. At the other end of the spectrum, San Francisco and Seattle had the lowest intake of ADEA charges of any district offices in the Nation; however, the California Fair Employment Practices Commission contracted for the resolution of 500 ADEA charges, while Washington State and Oregon contracted for the resolution of 238 and 172 respectively. Thus, San Francisco and Seattle accounted for only 4 percent of the total EEOC ADEA charge intake; by contrast, their contracting agencies accounted for 32 percent of the total number of proposed contract charge resolutions.

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[58] But see, supra, footnote 18. Cross-training is apparently planned for the near future. Interview with Cathie Shattuck, then Acting Chairman, Apr. 12, 1982.

[59] These are State agencies with which charging parties must file charges, pursuant to section 14(b) of the ADEA.

[60] Unlike title VII which requires that the Commission defer its processing for 60 days or until the State agency has completed its processing, whichever is earlier, the ADEA authorizes simultaneous processing by the Federal and State agencies. The EEOC distinguishes these statutory requirements through "deferral" and "referral" nomenclature.

The work-sharing agreements with the contracting agencies provide generally that all charges filed with either the State or the EEOC will be considered "dual filed," thereby satisfying the requirements of section 14(b) of the ADEA.[61] The agreements also designate certain categories of charges which will be transmitted by the EEOC to State agencies for processing, and those which the State agencies will transmit directly to the EEOC.

Through use of these State agencies, the Commission is able to assure substantially greater charge resolutions than it could otherwise obtain on its own. In fiscal year 1981, the Commission contracted for the resolution of 2,235 charges; of those, 804—36 percent—were charges originally received by the Commission.[62] The fiscal year 1982 contracts called for the resolution of 2,826 charges, 753—27 percent—of which were EEOC receipts. The State and local division (of Field Services) anticipates that proposals for fiscal year 1983 contracts will be submitted to the Commission in August or September 1982. For the first time since the Commission began contracting with State agencies for the resolution of ADEA charges, the fiscal year 1983 contracts will impose four management quality goals on the agencies. These will include establishment of an average processing time of 220 days; settlement rates of 20 percent; completion of section 7(d) conciliation within 135 days; and a productivity rate of five charges per EOS per month.[63] Satisfaction of any or all of these goals will entitle agencies to increased levels of reimbursement per charge resolution, assuming the availability of resources.

G. COMMENTS ON ADEA ADMINISTRATIVE ENFORCEMENT EFFORTS

(1) *The Commission has failed to direct adequate resources to directed investigations under the ADEA.* Appendix III reflects that the Commission has undertaken virtually no directed investigative activity under the ADEA. Rather, its resources have been targeted almost exclusively at individual charge resolution. As a result, directed investigations constituted less than 1 percent of the Commission's ADEA caseload in both fiscal years 1980 and 1981. In fiscal year 1980, the average number of directed investigations instituted per office was 3.8.[64] Thirteen offices instituted three or less during that period. In fiscal year 1981, the average number of directed investigations decreased to 3.5 per office; 16 offices instituted less than that number.

The Commission stresses that it has sustained an unanticipated increase in charge filings under the ADEA, which necessitated concentrating its resource in the area of individual charge resolutions. Indeed, to deal with this increase the Commission actually transferred title VII resources into ADEA enforcement during fiscal years 1980 and 1981.

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[61] See footnote 59 supra.

[62] A problem was encountered in the fiscal year 1981 program, however. Because of the continuing resolution, OMB would not release all of the Commission's State and local appropriations as early as originally scheduled, and thus the Commission had to defer the contracts with State agencies until July 1981.

[63] These standards are not identical to those which the EEOC imposes on its own offices because State agencies are subject to somewhat different statutory constraints and procedures than those under the ADEA.

[64] See item entitled ADEA statistics—fiscal year 1980, in exhibit 10. Discounted from the fiscal year 1980 figure were the 120 directed investigations initiated by the Milwaukee district office. Committee staff was advised that the office undertook investigative activity with respect to a State law which affected over 100 localities. It then counted each locality as a separate directed investigation; this report does not do so.

The increase in charge filings should not have come as a total surprise to the Commission. Historically, there has been an annual increase in title VII charge filings almost every year since the statute's enactment. Thus, a certain annual increase in ADEA filings should also have been expected. In addition, there were other factors which rendered an increase in ADEA filings likely. The statute was amended in 1978 to lift the upper age limit to 70. While this lifting of the upper age limit did not of itself result in a substantial increase in charges,[65] the publicity attendant upon the amendments may well have generated a higher level of public awareness, especially among older workers, as to rights under the ADEA. Moreover, the Commission's longstanding policy under title VII has been to accept all charges filed, even those which are dismissed for lack of jurisdiction. The Commission has adopted the same approach with respect to ADEA charges. This apparently is contrary to the former practice of the Labor Department. According to numerous former and current DOL employees, Labor actively discouraged the filing of a number of charges which were either nonjurisdictional or appeared nonmeritorious.

The Commission also computes its charge intake by the names and numbers of individual charging parties; thus, if one employer is named in 20 charges, 20 new charges are entered into the Commission's reporting system. By contrast, the Department maintained charge-filing records by name of respondent. Thus, a respondent against whom several charges had been filed would show up only once in the Department's intake records. Finally, the Commission actively counsels title VII charging parties within the protected age group of their ADEA rights. This counseling undoubtedly results in an increased number of ADEA and concurrent filings.[66] Had these factors been taken into account by the Commission in advance of its assumption of the ADEA jurisdiction, the increase in ADEA charges would not have come as such a surprise.

Even had the increase in ADEA intake been entirely unpredictable, charge intake alone does not appear to bear any direct correlation to directed investigations initiated. In fiscal year 1981, three offices with higher than average charge intake—New York, Baltimore, and Chicago—also exceeded the national mean of 3.5 directed investigations (at 10, 6, and 4 respectively). Moreover, three offices with very low charge intake—Houston, Miami, and San Francisco—exceeded the 3.5 national figure for directed investigations only slightly, at 6, 6, and 4 investigations, respectively. Only two offices, Detroit and Seattle, experienced charge intake levels that were very low—190 and 152, respectively—coupled with relatively high numbers of directed investigations—16 and 14 respectively. (See appendix VII; exhibit 10.) Thus, it appears that the failure of the Commission to develop and undertake a significant program of directed activity stemmed at least in part from its failure to plan and allocate resources for such a program.

In addition to the failure to plan adequately for directed work, various institutional procedures and requirements act to discourage the initiation of directed investigations. The MAP instructions (exhibit 9) make clear that directed investigations are not to be instituted at the expense of individual charge resolutions (see page 28).

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[65] In fiscal year 1981, a total of 451 charges were filed by individuals in the 65 to 69 age band. See exhibit 12, fiscal year 1980 charge filings; fiscal year 1981 charge filings by issue, age band, and sex; fiscal years 1980 and 1981 charge filings by industry.

[66] Appendix III reflects that in fiscal year 1981 over 2,000 charges were filed concurrently under title VII and the ADEA.

Offices are not assessed on the basis of directed activity undertaken (see appendix II). Indeed, unlike title VII where performance indicators and processing assumptions are established separately for factfinding and continued investigation units, a single set of performance indicators and processing assumptions is applicable to ADEA administrative enforcement. Since cases in factfinding may be resolved more easily and quickly than those in full investigation, treating them the same for purposes of MAP planning and performance assessment may be a genuine disincentive to conducting full investigations.

While there is no question that the Commission must engage in sensitive balancing to determine the proportion of its ADEA resources it will devote to individual processing as opposed to fuller investigative activity, it appears that the balance which has been struck is not as sound from the standpoint of enforcement as it should be. It bears reiterating that the ADEA, unlike title VII, does not require that the Commission investigate and resolve every charge. Thus, the Commission has substantially greater leeway under the ADEA to structure its enforcement program in a manner designed not only to address individual complaints, but also broader patterns of discrimination.

(2) *The Commission has failed to develop any systemic enforcement authority under the ADEA.* This point is related to the first. Under title VII, the Commission operates a systemic enforcement program with a separate headquarters division and discrete systemic units in each district office. Headquarters staffing in the systemic program is approximately 85 people. Staffing in the field is reflected in appendix V.

The systemic program is not the same as the "continued investigation" function under title VII. Rather, it is a separate and discrete program which has as its primary objective targeting respondents believed to be engaged in patterns and practices of discrimination. Pursuant to that targeting, the Commission files systemic charges against the respondents; conducts investigations; issues findings; and litigates, if voluntary resolution is not achieved.

The Commission has recently made a concerted and commendable effort to upgrade the status of its title VII systemic enforcement program. As noted, each district office maintains a separate systemic unit. The MAP instructions provide that each office should designate four full-time EOS's and one full-time supervisor for staffing the systemic unit.[67] These staffing instructions, as well as budgetary resources devoted to the systemic program, reflect a significant commitment to such enforcement efforts.

This dedication of staff and monetary resources for title VII systemic enforcement differs substantially from the situation which prevails with respect to the ADEA. All ADEA enforcement responsibilities are consolidated into one age (or age/pay) unit. By contrast, title VII compliance is accomplished through various discrete units, including the systemic units. As appendix V reflects, in over half of the district offices, staffing in the title VII systemic units alone exceeds that in the age (or age/pay) units. Each systemic unit has its own supervisor; by contrast, in a substantial number of offices, one full-time supervisor is assigned responsibility for both ADEA and equal pay enforcement. Thus, neither headquarters nor any district office has developed an institutional structure which lends itself to ADEA systemic enforcement. And, indeed, in a number of district offices there is not even one supervisor who can devote him/herself full time to ADEA enforcement. Instead, one ADEA/EPA supervisor is responsible not only for a variety of different types of enforcement activities, but for enforcement of two statutes as well.

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[67] See Fiscal Year 1981 Management Plan, p. 28, exhibit 9.

Past title VII experience demonstrates that unless the Commission establishes an institutional structure and clearly focuses its resources on the development of a systemic program, such enforcement will happen only in a piecemeal and ad hoc fashion. Thus, it is critical that the Commission begin now to devote resources to the development of an age systemic enforcement program. This is not to suggest, however, that ADEA enforcement should merely be inserted into the existing title VII systemic program structure. Procedural and substantive differences between title VII and the ADEA may well render the existing systemic program structure and procedures inappropriate for ADEA cases. In particular, existing procedures are far too time consuming in light of the ADEA's statute of limitations. The Commission should, however, determine the best manner for institutionalizing an ADEA systemic program and move promptly toward its implementation.

(3) *Proposed changes in organizational structure and processing procedures may prove disadvantageous from the standpoint of ADEA enforcement.* One of the questions specifically raised by this committee's correspondence with the Commission was whether any organizational changes were contemplated which might impact on age processing. In response, the Commission noted that:

> The * * * Acting Executive Director has determined that investigation under all statutes (title VII, ADEA, and the EPA) are to be processed in common units. He has set October 1 as the implementation date.[68]

In addition, agency personnel confirmed that substantial reductions in compliance side personnel and the closing of numerous area offices and several district offices were under consideration. With respect to the former, the current actual level of compliance professional staffing in the field is 1,256 positions. A new ceiling for fiscal year 1983 was recently set at 1,136 positions. As to the closing of offices, the committee has not been formally advised as to which, if any, offices are targeted for closing.

The proposed *merger of processing units* in the field provides serious grounds for concern with respect to ADEA enforcement. In testimony before the House Select Committee on Aging, the former Chair of the EEOC stated that:

> During this initial period EEOC has maintained the programs as separate and distinct. This was done to allow special and particularized oversight in an effort to maintain enforcement and efficiency at a high level, to provide for a close study of ADEA operations to see where improvements and expansion were needed, and to reassure protected groups of the spe-

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[68] See exhibit 4, memorandum to Edgar Morgan from Martin Slate, dated Apr. 1, 1982.

> cial priority we attached to enforcement of the ADEA separate and apart from our existing responsibilities for title VII.[69]

The need to assure "particularized oversight" of the ADEA program expressed by Chair Norton was genuine. It does not appear that the Commission has undertaken any comprehensive analysis to determine whether that need no longer exists. Nor is there any indication that the Commission has seriously addressed the question of whether merger of processing units will lead to greater efficiencies and enhanced enforcement capabilities under any of the statutes it administers. In the absence of reviews of this nature, a movement to merge processing appears precipitous at best and may well prove to be counterproductive from the standpoint of enforcement.

The Commission formally approved and transmitted its ADEA procedural compliance manual to all field offices less than 1 year ago (see appendix I and discussion on page 20). Complete nationwide implementation of this procedural guidance in the field was only recently accomplished. Moreover, drafting of the ADEA interpretative manual has just recently begun; not even one chapter has reached the Commission for its approval. Thus, it is questionable that the Commission is sufficiently expert in age enforcement at this point to justify merger of processing units. Without greater expertise, such a merger could easily extinguish the finely honed distinctions between ADEA and title VII enforcement which the statutes mandate the Commission to preserve. In addition, to the extent that the ADEA enforcement program suffers from inadequate resources or the failure to undertake extensive investigative activity, merger of the processing units may well only exacerbate those problems.

Finally, it simply does not appear that training in ADEA procedures or cross-training in all of the Commission's jurisdictions has been sufficiently extensive to enable all EOS's and supervisors to investigate violations arising under *any* statute. The chart on page 32 reflects that the Commission conducted ADEA supervisor training in new ADEA procedures in September 1981, just 1 year ago. The supervisors were advised to transmit the training materials to their staffs but there has been no additional formal training (at headquarters) of these compliance officers. Moreover, relying on the information submitted by the EEOC to this committee, there appears to have been little—if any—cross-training of EOS's or unit supervisors in jurisdictions other than those which they currently administer.

Enforcement is more than mere claims adjustment. Thus, it is simply unreasonable to assume that all EOS's, in the absence of appropriate and comprehensive training, can resolve equally well charges arising under any statute which the Commission enforces. Rather, effective enforcement requires a substantial body of experience and substantive expertise. Even in factfinding, with its emphasis on early settlement, EOS's are expected to identify those cases which carry the potential for findings of substantive violations. These are then to be referred for more extensive investigation. Without training and experience, however, it is unlikely that an EOS accustomed to title VII factfinding could readily identify ADEA violations (or vice versa). As a result, important enforcement vehicles would be lost. In light of these factors, it does not appear that any advantages which might accrue to the Commission by way of administrative convenience would outweigh the potential disadvantages from an enforcement standpoint of merging all processing units at this time.

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[69] See hearings, supra, footnote 8, at 39 (exhibit 2).

Staff reductions will invariably have an effect on enforcement under any of the statutes administered by the Commission, including the ADEA. The committee recognizes, however, that such reductions may well be unavoidable due to budgetary cutbacks. And it does appear that notwithstanding overall staff reductions, nationwide staffing for ADEA enforcement has in fact increased (see page 30).

The Commission should explore ways in which it may more effectively utilize its State contracting program to compensate for reductions in EEOC staff. ~~In~~ particular, where State agencies are able to assume more of the EEOC caseload than that for which they have currently contracted, it would be appropriate to consider increasing these State contracts.[70] Such an increase would allow the Commission to move ADEA enforcement positions to district and area offices where need is great and staff reductions will have a particularly deleterious effect.

The *closing of area offices* is a matter of further concern, unless there is a clear showing that the closing of designated offices will not impact negatively on the visibility and accessibility of the EEOC to age complainants. One of the ongoing concerns raised by this committee's staff, as well as others, has been whether the significantly lower number of offices available for charge intake and processing at the EEOC than were available at Labor has worked in any way to the disadvantage of complainants.[71] While the absolute numbers of new ADEA charge filings has increased since the EEOC assumed jurisdiction, the Commission apparently has never compared charge intake/investigations at DOL offices during its years of enforcement to the intake/investigations at EEOC offices located within the same geographic area. Thus, it has not been determined whether relative intake in certain regions may in fact have declined and, if so, the reasons for that decline. Such a comparison would seem necessary and appropriate prior to taking any action which might in fact decrease even more significantly the visibility and accessibility of various age enforcement units. In addition, there is no question that the EEOC's wider geographic dispersion of age processing units limits its ability to conduct onsite investigations; this problem will only be exacerbated if any of the area offices slated for closing are those with ADEA units or staff.

(4) *The Commission should determine immediately whether assignment of additional ADEA enforcement personnel to various area offices would enhance its compliance efforts.* As appendix VI reflects, ADEA charge intake in at least 14 area offices without age enforcement staff is as high as intake in five district and area offices which have age processing personnel.

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[70] In her testimony before the House Select Committee on Aging, former Chair Norton stated that: "It is our long-range intent, assuming sufficient funds are available, for State agencies to investigate and resolve as many jointly filed individual charges as possible, freeing the limited staff resources transferred from DOL to EEOC to concentrate on jointly filed charges alleging class actions, and upon directed investigations." Hearings, supra, footnote 8, at 87 (exhibit 2). Whether that continues to be the Commission's intention is unknown. If the Commission does ultimately transfer most individual processing to State agencies, it must maintain very close oversight.

[71] The Department of Labor had 10 regional offices and nearly 300 area and field offices which engaged in ADEA enforcement activity.

The question immediately raised by this comparison is what criteria are used by the Commission to determine which offices will have age processing personnel. If one criterion is attainment of a certain critical mass of ADEA charge intake, it appears that this criterion has not been uniformly applied. For example, at least 12 area offices have ADEA intake meeting or exceeding the intake of the New Orleans district office which maintains a fully staffed ADEA unit. Indeed, the Minneapolis area office (where there is no age unit) has an intake of ADEA charges that exceeds all but 8 of the 28 offices with age units.

Another question raised by comparing those offices with age units/personnel to those without is whether the absence of age compliance personnel depresses charge intake, or alternatively, whether there is a correlation between the presence of age processing personnel and the ADEA intake. The Commission's own experience under title VII may be instructive with respect to this question. While no formal study has been done, Commission staff report that an analysis of title VII charge filings within various localities reflects a rather dramatic increase in several *after* the opening of local area offices. Whether such an increase occurred depended on a variety of factors, including whether there was a State or local fair employment practices agency which had, in the past, absorbed caseloads which otherwise would have fallen to the Commission. At least in some instances, however, it is clear that the growth in charge filings within a particular jurisdiction was directly traceable to the opening of an area office. In those cases, the heightened visibility and accessibility of an area office apparently served as an incentive for complainants to pursue their title VII rights. Similarly, an increase in ADEA charge intake might be expected to occur were age processing units established in more area offices.

The Commission could also assess the likelihood that addition of ADEA staff to area offices would increase charge intake by comparing its current intake in various area offices with that of the local DOL offices, prior to the transfer. In this way, the Commission could determine whether its concentration of ADEA staff has had a disproportionate impact on ADEA compliance activity within particular areas.

A final point with respect to the Commission's area offices without age processing personnel is that a substantial number of them are located in States in which there is either no EEOC district office or no State agency with which the Commission has contracted for the processing of ADEA charges. They are as follows:

Area offices in States with no district office: Little Rock, Ark.; Norfolk, Va.; Jackson, Miss.; Albuquerque, N. Mex.; Greenville, S.C.; Newark, N.J.; Oklahoma City, Okla.; Louisville, Ky.; Richmond, Va.; Minneapolis, Minn.

Area offices in States without EEOC contracting agencies: Little Rock, Ark.; Norfolk, Va.; Jackson, Miss.; Albuquerque, N. Mex.;[72] Greenville, S.C.; Oklahoma City, Okla.; Louisville, Ky.; Richmond, Va.

As is obvious from the above, there is substantial overlap between the area offices listed. The result is that there is no age enforcement activity undertaken directly in Arkansas, Kentucky, New Mexico, Oklahoma, Mississippi, or Virginia. These offices in particular should be scrutinized to determine whether the addition of ADEA compliance personnel is appropriate.

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[72] Both the New Mexico FEP and the South Carolina FEP agencies contracted for processing of ADEA charges in fiscal year 1981, but not in fiscal year 1982. See exhibit 11.

(5) *The Commission needs to assess its distribution of ADEA enforcement personnel compared to caseloads on a nationwide basis to determine whether movement of slots among offices is appropriate.* Although staff reductions may be unavoidable, there is a related issue—that of *distribution of staff* within and among offices—which the Commission needs to address to assure that limited personnel resources are allocated and utilized as effectively as possible.

The Commission already engages in ongoing reviews of charge intake and staffing per office, to determine the extent to which individual offices suffer staffing shortfalls disproportionate to their caseloads. Based on those reviews, personnel within offices are shifted from one unit to another to correspond to workload need. It is equally essential from the standpoint of ADEA enforcement, however, to determine whether there is any maldistribution of ADEA enforcement personnel *among* offices, compared to the concentration of ADEA charges within each office. Appendix VII attempts such an analysis, comparing total ADEA staff within each office to intake of ADEA charges. Based on that analysis, it appears that the ratio of new charges to available staff is significantly higher in some offices than in others, and that the range—from 23 per EOS to 158 per EOS—is substantially greater than it should be.[73] Assuming that this ratio is an accurate measure of workload, it appears that some shifting of ADEA slots among offices is called for. Alternatively, the Commission should consider whether movement of ADEA staff into area offices would provide for a more even distribution of the nationwide caseload.

(6) *The EEOC should undertake an assessment of the effect that the introduction of new charge-processing procedures has had on substantive ADEA enforcement.* While the EEOC has indicated that ADEA charge filings, closures, and benefits have increased since the introduction of new rapid charge-processing procedures into age, these data are not necessarily conclusive indicators that *substantive enforcement efforts* have been enhanced. Indeed, these particular procedures give rise to at least two potential problems which might undermine substantive enforcement efforts. First, as noted in No. (1) above, the ADEA MAP requirements, with their undifferentiated emphasis on total numbers of charge resolutions regardless of processing mode, may create a disincentive to engaging in full investigations. Since charges are resolved more easily through factfinding than extensive investigations and since all resolutions are credited equally, there is a substantial amount of pressure to resolve as many charges as possible in factfinding. While it is not possible to judge, it is reasonable to assume that an overwhelming number of these are settled after a most superficial investigation, with little or no concept of "full relief" as the measure against which the reasonableness of a settlement is assessed. Indeed, with the recent elimination of the monetary benefits performance indicator (see page 29), one of the few important headquarters' controls over the settlement process was eliminated. Without adequate safeguards, then, this pressure to "settle" charges, may seriously undermine substantive enforcement.[74]

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[73] This analysis is flawed if intake is not an appropriate measure for assessing EOS workload.

[74] Note also that benefits data provides only "mean" figures. Thus, one or more extremely large settlements could inflate the averages rather substantially. The Commission does not regularly report or maintain "median" benefits data.

The second area of concern with respect to the Commission's new procedures is whether any specific requirements imposed by the compliance manual or procedural regulations restrict the ability of EOS's to conduct investigations and negotiations with respect to their findings. The Commission has made a commendable move in the direction of formalizing enforcement procedures. This potentially allows for a greater monitoring capacity and, hence, a sounder basis on which to determine performance. Such formalization will also go a long way to insure accountability. However, one concern occasionally expressed by field investigators is that in the move to formalize procedures and make them consistent with title VII where possible, the Commission may have gone too far. A specific example cited is the introduction of a formal *letter of violation*. This LOV is analogous to the *letter of determination* issued under title VII, pursuant to the statutory requirement that the Commission investigate and issue a determination with respect to each charge. Under title VII, the Commission's obligation to conciliate commences only when it issues the letter of determination. By contrast, the ADEA imposes no requirement that the Commission issue determinations, but does impose an ongoing requirement that the Commission conciliate charges, even prior to the commencement of an investigation. Many seasoned investigators believe that the absence of a formal determination requirement gave them a substantial upper hand in negotiating settlements of administrative findings of violation. Now, they express concerns that introduction of such a requirement will induce respondents not to engage in conciliation until they see whether, in fact, the Commission will issue a formal determination.[75] There is no information available to the committee at this time which would indicate if that result has occurred. The Commission, however, should determine whether these fears have been realized and, if so, the most appropriate manner for assuring that enforcement efforts will not be unduly hindered by formalized procedures.

(7) *The Commission should carefully review its reporting procedures and instruments under the ADEA to assure that reports relative to enforcement activities accurately reflect compliance activity and remedies obtained.* In the course of this investigation, numerous documents were supplied to the committee or made available for onsite review which reflected, generally, charges filed; investigations initiated; closures; and benefits. Information was provided for both fiscal years 1980 and 1981. Reviewing and attempting to work with these documents was problematic for several reasons.

First, even for information reported for the same year, various specific categories contained different figures, e.g., numbers of charges filed varied from one report to another.[76] Some of these variations may no doubt be accounted for by the date on which a document was compiled and/or supplied, with those compiled at a later date presumably reflecting more recent (and reconciled) figures. In addition, some documents apparently included in their calculations of totals those allegations or charges filed with State agencies, as well as those filed with the EEOC, while others included only those filed with the EEOC.

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[75] See footnote 40 supra, and accompanying text.

[76] For example, for fiscal year 1981, Mission (exhibit 5) stated that 9,550 ADEA charges were filed; charge intake data in exhibit 12 reflected that 9.099 were filed (two volumes entitled analysis of ADEA charges for fiscal year 1981 by EEOC district/area office); but the total charge figure in the computerized printouts by industry was 10,045; and data reviewed onsite showed total EEOC intake of 8,100 charges. Trying to reconcile these figures was an overwhelming task.

Whatever the reasons for the variations, the inconsistencies made it extremely difficult to develop precise computations with respect to the data reviewed; this, in turn, rendered the monitoring of patterns and trends very difficult.

Second, the reporting format apparently changed from fiscal year 1980 to fiscal year 1981 (or at least, the reports submitted to the committee were in different formats for each fiscal year). The differences were manifested particularly in two respects. Some results reported in fiscal year 1980 were not reported in fiscal year 1981, or vice versa. In addition, certain reporting categories were broken out separately in 1 year, while subsumed within another for the other year. Since the reports themselves contained no descriptive language clearly specifying what each category actually represented, comparisons between fiscal years 1980 and 1981 were, again, imprecise. This also made monitoring of trends quite difficult.

Finally, some of the figures reported by certain offices raise questions as to reliability. Exhibit 10 for example, reflects that although only 200 directed investigations were initiated nationwide during fiscal year 1980, the Milwaukee district office reported that it initiated 120 of them. Similarly, in the exhibit 10 item reflecting ADEA benefits for fiscal year 1981, Milwaukee reported that it had obtained $13,938,637 in "awards to individuals"; this figure was 84 percent of the nationwide total for "awards to individuals."[77] These figures may in fact reflect that office's actual experience under the ADEA. However, since they are so substantially out of line with the performance of other offices, they immediately appear questionable.[78] And if these figures are, in fact, unreliable, they distort nationwide data as a whole, thereby casting doubt on the reliability of the entire reporting system. Since accuracy of reporting is so essential for measuring agency enforcement efforts, the Commission should immediately assess its reporting system and take appropriate measures to assure its consistency, uniformity, and precision.

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[77] See footnote 55 supra.

[78] Questions of various individuals at the EEOC about these specific figures yielded different and conflicting answers. Several officials stated that the Milwaukee district office had obtained a huge settlement, and that the figures were not inflated. Others, however, said that the figure was as high as reported only because "future benefits"—i.e., the amount of earnings which individuals would receive as a result of the lifting of a mandatory age limit—were included as "'awards to individuals." Until further specific inquiries and answers are available, it is impossible to determine precisely the explanation for the $13,938,637 figure.

Chapter 4

ENFORCEMENT ACTIVITIES THROUGH THE OFFICE OF GENERAL COUNSEL

The Commission's Office of General Counsel was established by the 1972 amendments to title VII, which authorized the Commission to file direct suit in Federal district court if it was unable to resolve its findings of violation through conciliation. This amendment was designed to "put teeth into title VII" because of the recognition that:

> Sadly enough, experience under title VII to date ha[d] borne out [Congress] concerns [about the lack of Commission enforcement power.] Conciliation alone ha[d] not succeeded in ending discriminatory employment practices, nor [did] it show any reasonable promise of doing so.[79]

Indeed, the Senate proposal to amend title VII (S. 2525) called for vesting cease-and-desist authority in the Commission. In contemplation of that objective, the bill also proposed the establishment of an independent Office of General Counsel, to serve as the prosecuting arm of the agency. S. 2525 relied explicitly upon the NLRB enforcement model. Thus, the Commission as a whole would investigate and issue findings, while the General Counsel would have exclusive authority to determine whether to seek enforcement orders based on the Commission's decisions.

There was a substantial amount of opposition to this grant of cease-and-desist authority. Many Senators questioned whether, despite the seeming independence of the General Counsel, the Commission would not *in fact* function as investigator, prosecutor, and judge. The compromise finally struck was to provide for Commission-initiated civil actions in Federal district court. The Office of General Counsel was statutorily established [80] with a General Counsel to be appointed by the President and confirmed by the Senate. While the bill in final form provided that the General Counsel was responsible for the "conduct of litigation as provided in sections 706 and 707," congressional rejection of a cease-and-desist mode of enforcement authority carried with it a corresponding rejection of the notion that the General Counsel's Office would be entirely independent of the Commission. Indeed, the act specifically provided that:

> The General Counsel shall have such other duties *as the Commission may prescribe* or as may be provided by law *and shall concur with the Chairman of the Commission on the*

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[79] See Legislative History of the Equal Employment Opportunity Act of 1972, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. (1972), p. 644 (statement of Senator Javits).

[80] Even prior to this explicit grant of statutory authority, the Commission had established an Office of General Counsel, with its head serving as the agency's chief legal officer.

appointment and supervision of regional attorneys.[81] (Emphasis added.)

Obviously, since the motivating concern in proposing an independent Office of General Counsel had been to assuage the fears of the opponents of cease-and-desist authority, once that authority was denied, the necessity for an independent General Counsel was likewise eliminated.

The Commission's procedures relative to the Office of General Counsel reflect the hybrid nature of that office. Investigations are conducted by EOS's in the field, with letters of determination issued by the district directors.[82] The Commission's procedural regulations do not contemplate any formal role for the General Counsel in the conduct of administrative investigations. Instead, involvement by the General Counsel's Office is limited to two functions. First, lawyers offer technical assistance when necessary to field EOS's. In particular, lawyers are actively involved in the development of ELI investigative plans. Second, the General Counsel (or his/her designees) reviews requests to set aside subpenas and submits a proposed disposition to the Commission.[83] In the final instance, however, the decision as to action taken on a subpena appeal is vested exclusively in the Commission.

Even in that area which title VII prescribes as the General Counsel's domain—the conduct of litigation—the Commission plays a major role. While the General Counsel is responsible for the actual conduct of litigation, suits under sections 706 and 707 may be filed only after Commission approval. This somewhat more extensive involvement of the Commission in the General Counsel's role than is customary in agencies with a statutorily independent Office of General Counsel reflects the compromise struck in 1972 and is designed to assure that the Commission's litigation program will be conducted fully in accordance with established agency policies and procedures. This involvement is also necessitated by the Commission's absence of independent rulemaking authority under title VII.[84] Lawsuits serve as the only mechanism through which the Commission may convert its voluntary guidelines into binding interpretations of law. Thus, litigation represents not only a law enforcement instrument in individual cases; it serves the equally important function of giving force and effect to the well-reasoned policy initiatives of the Commission.

A. ORGANIZATIONAL STRUCTURE AND STAFFING (TRIAL DIVISION)

The Commission's litigation program is operated through the Office of General Counsel in headquarters, with a field structure headed by a regional attorney in each district office, and attorneys reporting directly to him/her. The number of attorneys in each office varies, depending on caseload and other factors. These field attorneys are responsible for all ADEA litigation.[85]

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[81] Section 705(b)(1), 42 U.S.C. 2000e–4(b).

[82] See EEOC title VII procedural regulations, 29 C.F.R. 1601.21(d).

[83] 29 C.F.R. 1601.16(b).

[84] Title VII only authorizes the Commission to provide "technical" assistance to employers and others subject to the act. Pursuant to title VII, the Commission has historically issued "guidelines," which though not binding, are entitled to great deference. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

[85] Most title VII litigation is conducted in the field as well. However, some title VII litigation responsibility is lodged in the Office of Systemic Programs, which has its own attorneys in headquarters.

In headquarters, there are currently three attorneys who have direct responsibility for reviewing ADEA cases recommended by the field offices for litigation approval and providing advice to the field. Two of these have also been involved extensively in the training of EEOC attorneys with respect to the substantive requirements and provisions of both the ADEA and the Equal Pay Act. The third has recently transferred into headquarters from a field office. All three were previously employed by the Department of Labor; they have substantial age expertise.

It is not possible to estimate the number of attorneys in the field who are involved in the ADEA litigation program. Commission attorneys for the most part are generalists; they rarely, if ever, specialize in litigation under one statute alone. To the extent that there is specialization, it occurs because an individual office determines that such specialization is appropriate or necessary. Since the Commission's actual civil caseload under the ADEA has increased dramatically each year since its assumption of the jurisdiction (see page 49), it constitutes an increasingly greater proportion of the litigation docket as a whole. Thus there appears to be ~~no~~ shortchanging or imbalance with respect to the amount of attorney time devoted to ADEA litigation as opposed to other jurisdictions.

B. Responsibilities of Field Attorneys

The field attorneys have several basic responsibilities which they exercise with respect to any of the statutes administered by the Commission. First and foremost, they are responsible for litigating the Commission's lawsuits alleging violations of the statutes. They also represent the agency in preliminary relief proceedings and subpena enforcement actions. Thus, theirs is a direct enforcement responsibility; they are never involved in representing the Commission in suits in which the agency is named as a defendant. Average caseload is projected at 11 cases per attorney.[86]

Second, as a result of the agency's 1978 reorganization which abolished the five regional litigation centers and reassigned the attorneys to the compliance offices, lawyers now are responsible for providing expert legal advice during the course of agency investigations. The agency attempts to keep to a minimum the amount of attorney time devoted to this function. In the Fiscal Year 1982 Management Plan, for example, instructions to the field specified that the amount of attorney time devoted to compliance side functions should not exceed 10 to 15 percent of total available attorney hours.[87]

As an adjunct of these compliance-related responsibilities, the legal units in each district office are also required to review all cases recommended for formal findings of violation, to determine whether they meet the litigation-worthiness standard.[88] In this regard, it should be noted that the ADEA Compliance Manual reproduced at exhibit 8 imposes time constraints on attorneys for completion of the litigation-worthiness review under the ADEA. These are fairly stringent and were designed to take into account the statute of limitations which makes prompt completion of ADEA administrative processing essential.

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[86] Fiscal Year 1982 Management Plan, p. 52 (exhibit 9).

[87] Ibid. This was a reduction from the fiscal year 1981 figure of 15 to 20 percent.

[88] See footnote 41 supra.

Finally, attorneys are extensively involved in the investigation and processing of cases identified through the early litigation identification (ELI) program. This program exists under age as well as title VII and EPA. The program's objective is to identify potential litigation vehicles very early in the administrative process (indeed, at intake if possible) and then to apply concentrated investigative efforts to the development of the "ELI." Compliance officers and attorneys work very closely in the development of the ELI investigative plans. Compliance officers are then responsible for the actual investigation, with attorneys available to provide assistance where necessary (see exhibit 8, Compliance Manual, section 212). Thus, even though a case is designated as an ELI, it remains in the appropriate administrative processing unit until a finding of violation has been made. It is formally transferred to the legal unit only after that finding.

Cases are identified as ADEA ELI's if they meet certain criteria which focus on the "strength and impact of [the] case," "issues involved," whether there are "special circumstances triggering identification" (e.g., recurring violations or retaliation), or whether the respondent is on a locally established list of respondents whom the agency has targeted for enforcement actions.[89] Among the issues which the Commission has identified for ELI processing are:

—Age-related denial or reduction of benefits to older workers which is not justified on a cost-to-employer basis.

—The use of non-job-related selection procedures which have an adverse impact on older workers.

—"Youth movements" or "housecleanings" associated with reductions in force or other key management changes.

—Acknowledged or documented employment policies aimed at enhancing employment opportunities for younger, but not for older workers, or at artificially depressing the number of older workers within the employer's work force.

—Practices based on "customer preference."

—Practices which constitute a violation of both the ADEA and title VII, e.g., age and sex discrimination against older women.

—Denial of training or other employment opportunities to older workers when a respondent has implemented new technologies; and

—Restrictions on the amount of prior experience an applicant may have in order to be considered eligible for a position.

While the focus of the ELI program is on early identification in order to enhance the likelihood of close attorney-EOS interaction, in fact, the ADEA ELI identification may be made at any stage of processing. For reporting purposes, the Commission has determined that all cases selected by the legal unit as litigation-worthy will be designated as ELI's. Although a data code in the Commission's reporting system permits a determination as to when ADEA ELI's were actually identified, it does not appear that the Commission in fact routinely assesses this information. Thus, it is difficult to compare the effectiveness of the ELI program under the various statutes administered by the Commission.

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[89] Compliance Manual section 212.2 (exhibit 8). The "respondents" list is confidential and is developed by each office on the basis of its experience with local respondents. The "issues" list is developed at the headquarters level, but the Office of Field Services encourages district offices to supplement it with those issues arising frequently within their geographic jurisdictions.

C. TRAINING OF FIELD ATTORNEYS

In fiscal year 1980, substantive ADEA training was provided to the field attorneys during five 1-day regional training sessions, conducted by two headquarters attorneys. In addition, many of the field attorneys have participated in the 10-day intensive litigation training program modeled after that developed by the National Institute for Trial Advocacy. By the end of fiscal year 1980, over 200 of the Commission's attorneys had participated in the trial advocacy training; [90] a comparable figure for fiscal year 1981 was not included in the documents submitted to the committee.

D. PROCEDURES FOR LITIGATION APPROVAL

After a finding of violation has been made and a letter of violation issued, the attorneys in the field offices determine whether the case is one which they will submit to headquarters for litigation approval. Once submitted, the case is reviewed and approved by various persons, including the ADEA lawyers, the Associate General Counsel for the Trial Division, and ultimately, the General Counsel. No case is presented to the Commission for approval unless the General Counsel has authorized its submission. The General Counsel usually only submits those cases which s/he has personally approved. Where, however, the General Counsel has reservations about a case because it raises novel or unsettled policy questions or reflects a position which s/he believes warrants reconsideration, the General Counsel's practice in the past has been to submit the case, along with his/her reservations, for review and final action by the Commission. This practice is consonant with preserving the independence of the Commission's policymaking function. Cases are finally authorized for suit only if approved by a majority of the Commission.[91]

E. DEVELOPMENT OF LITIGATION STRATEGIES

In fiscal year 1981, the Office of General Counsel/Trial Division created a title VII litigation strategy committee, whose function was to engage in planning a nationwide litigation program with respect to certain title VII issues. During that same period, an ad hoc ADEA Litigation Task Force was established and held several meetings. This committee developed a proposed task force report which identified special problems encountered under ADEA litigation (but not under title VII) and proposed strategies for overcoming these problems.[92] The task force's report was never issued in final form; as of this writing, the group has for all practical purposes been disbanded.

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[90] Fiscal Year 1980 Annual General Counsel Report, p. 32 (exhibit 6).

[91] These procedures have been utilized by the Commission for title VII litigation since 1972.

[92] The task force's interim report is not included here, since it involves matters of litigation strategy the disclosure of which might undermine the Commission's ADEA enforcement efforts.

The only ADEA issue on which the Commission appears to have developed a comprehensive trial litigation strategy, as reflected in its litigation portfolio as well as documents attached as exhibit 14, is the application of the bona fide occupational qualification (BFOQ) defense to minimum hiring and maximum firing ages for police and firefighters.

F. Actual Litigation to Date

By all accounts, the Commission has committed substantial resources to its ADEA litigation program. The number of filings grew from 25 in fiscal year 1979, to 52 in fiscal year 1980, to 89 in fiscal year 1981. This latter figure reflects the highest number of ADEA lawsuits filed by the Government during any 12-month period since the act's passage. During the first 6 months of the current fiscal year, however, the Commission approved only 12 ADEA lawsuits. Should this rate be sustained throughout the fiscal year, it would represent a very significant and troubling decline in ADEA litigation enforcement activity.

The Commission's lawsuits run the gamut of issues under the ADEA. Predominant among these are suits alleging that State and/or local authorities have violated the act by requiring the mandatory retirement of police and firefighters at ages earlier than 70, or by refusing to hire any persons above a certain age for those positions. These policies directly impact on the employment opportunities of members of the protected age group. In all, the Commission has filed approximately 45 suits challenging these maximum/minimum age policies. Included among these are challenges both to the termination of line officers, as well as desk officers and supervisory personnel. Many have included prayers for preliminary injunctive relief to bar the termination of affected employees.

A preliminary question raised in most of these police/firefighter cases is the constitutionality of the ADEA as applied to State and local governments. Public defendants in a number of cases have argued that the Supreme Court's decision in *National League of Cities* v. *Usery*,[93] holding unconstitutional the extension of the Fair Labor Standard Act's minimum wage provisions to State and local employers, governs the application of the ADEA as well. The Commission has succeeded in rebutting this argument in most cases but was unable to do so in *EEOC* v. *State of Wyoming*.[94] As a result, that case is currently pending before the Supreme Court.

While the Supreme Court's decision in *Wyoming* will determine the constitutional issue, it will not reach the merits of the BFOQ defense in the police/firefighter cases. There is, however, now a split in the circuits on the merits in cases brought by the EEOC. In *EEOC* v. *City of Janesville*,[95] the seventh circuit refused to sustain a lower court's preliminary injunction ordering the city to reinstate a police chief who had been mandatorily retired at age 55, pursuant to a local ordinance. The court held that the applicability of the BFOQ exception is determined on the basis of the nature of the overall business (here, law enforcement) rather than on the basis of the specific occupation in question.[96] Because it found that the BFOQ might apply to the overall business of law enforcement, it dissolved the district court's preliminary injunction.

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[93] 426 U.S. 833 (1976). But *cf.* *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976), upholding as constitutional title VII's extension to State and local governments.

[94] 514 F. Supp. 595 (D. Wyo. 1981), prob. juris. noted 50 U.S.L.W. 3547 (1982).

[95] 630 F.2d 1254 (7th Cir. 1980).

The eighth circuit reached a precisely contrary result in *EEOC* v. *City of St. Paul.*[97] There, the court held that the BFOQ exception to the ADEA does not justify the mandatory early retirement of city fire department district chiefs. The court accepted the EEOC's argument that the applicability of the exception depends on the *occupation* involved and not the general nature of the business. The Commission argued—and the court agreed—that age is not a BFOQ for supervisory personnel who are not engaged in direct line functions.

Other issues about which the Commission is engaged in significant litigation activity include the following:

—Failure or refusal to hire or rehire because of age (at least 27 cases filed).

—Age-based discharge or involuntary retirement (at least 41 cases filed).

—Age-based discharge pursuant to a mandatory retirement policy (at least six cases filed).

—Refusal to promote or transfer into new positions (at least 11 cases filed).

—Age-based denial of or decreases in severance pay (at least four cases filed); and

—Denial of or less favorable treatment with respect to certain benefits, ~~including long-term disability, pension~~, health, or vacation leave pay (at least six cases filed).[98]

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[96] The BFOQ defense under the ADEA is worded identically to that under title VII. Courts, however, have frequently applied a much less stringent analysis to BFOQ cases in the age area in large measure because most of them involved jobs where public safety was at issue (e.g., busdrivers and airline cases). Under the ADEA, two different tests have been applied. The first, exemplified by *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975) requires only that the employer demonstrate some rational basis in fact for concluding that the hiring of employees over certain ages would increase risks to the public. The other test—stricter and modeled after title VII case law—requires that the employer show that s/he has a factual basis for believing that all or substantially all persons within the plaintiff's age group would be unable to perform the essential duties of the job or that some members of the age group possess a disqualifying characteristic which cannot be measured on an individualized basis. *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976). Note, however, that notwithstanding the application of this stricter standard, the *Tamiami* court nonetheless upheld the bus company's policy of refusing to hire busdrivers within the protected age group.

Under title VII, BFOQ defenses are seldom affirmed. It should be noted, however, that the defense has rarely been raised in the context of a public safety situation. And the only Supreme Court decision with respect to sex-based BFOQ's, *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), upheld the Alabama State prison system's exclusion of women guards from "contact" positions in male maximum security prisons. The court noted that the "essence" of a prison's business was to maintain prison security. It then characterized Alabama's maximum security facilities as being "peculiarly inhospitable" and like a "jungle atmosphere," where no attempt was made to separate sex offenders from all other hardened criminals. In this environment, the court concluded, a woman's very femaleness would pose a threat to the essence of the employer's business. Whether the court's decision in *Dothard* will signal a retreat from the heretofore very strict application of the BFOQ defense under title VII remains to be seen.

The analysis applied in ADEA public safety BFOQ cases has, however, recently been applied in the context of the business necessity defense to title VII. *Burwell* v. *Eastern Airlines, Inc.*, 633 F.2d 361 (4th Cir. 1980), involved a challenge to the company's policies requiring that pregnant stewardesses take leave immediately upon learning of their pregnancy. While the court refused to uphold the policy to the extent that it required immediate furlough of pregnant stewardesses, it nonetheless found that the company acted reasonably to require the grounding of stewardesses after their 13th week of pregnancy.

[97] 28 FEP Cases 312 (8th Cir. 1982)

[98] These numbers are based on a review of 108 complaints submitted to the committee by the Office of General Counsel (exhibit 13). The Commission's actual filings under the ADEA are greater, but the analyses conducted for this section could only be based on those complaints submitted. Additional complaints not submitted to the committee may well affect the actual distribution of lawsuits among issues.

Several other suits challenge age-based advertising practices; failure to comply with the Commission's recordkeeping and reporting requirements; and other practices of disparate treatment based on age. (See exhibit 13 for summary review of cases filed.) Of the 108 complaints reviewed for this report, 62 (57 percent) involved suits against private employers; 46 (43 percent) were suits against public employers. Three suits also named unions as defendants. In almost all cases, the Commission has sought a full range of equitable relief and liquidated damages.

One controversial question under the ADEA which is the source of much recent debate is whether the act prohibits only those practices which are discriminatory in intent, or whether—like title VII—it proscribes actions which, though neutral on their face, have an adverse impact on members of the protected age group. The ADEA's substantive enforcement provisions are patterned precisely after those under title VII. Thus, in relevant part, the ADEA makes it unlawful for respondents to:

> Fail or refuse to hire or to discharge * * * or otherwise discriminate against any individual * * * because of age.
>
> Limit, segregate, or classify * * * employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of * * * age.[99]

Courts have relied upon this "limit, segregate, or classify" language under title VII to prohibit practices with a discriminatory effect.[100] Under the ADEA, however, only one court to date has explicitly applied the disparate impact mode of analysis to a policy which had an adverse impact on older workers. In *Geller* v. *Markham*,[101] the Second Circuit Court of Appeals held that a school system's policy favoring the hiring of persons with less than 5 years of experience had a disparate impact on older teachers and therefore violated the ADEA.

The EEOC's litigation program has apparently made no contribution to the development of this area of the law. While the Commission's suits generally include allegations that both sections of the ADEA have been violated, in fact it does not appear that the EEOC has brought or participated in any pure disparate impact case. This absence of any EEOC litigation seeking to develop the disparate impact analysis under the ADEA is quite disturbing in light of the fact that the Commission has a well-established policy of pursuing title VII disparate impact cases.[102]

G. Appellate Division

The EEOC's trial litigation program is complemented by the work of its Appellate Division. The Division consists of 18 attorneys. As is true with respect to trial work, none of the attorneys are age specialists. However, to the extent that specialization may be necessary or desirable for any component of the agency's litigation program, it would seem to be unnecessary in the appellate area since the issues involved present legal questions which generally may be analogized to well-established principles under title VII.[103]

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[99] Section 4(a), 29 U.S.C. 621 et seq.

[100] See e.g., *Griggs* v. *Duke Power Co.*, supra, footnote 84.

[101] 635 F.2d 1017 (2d Cir. 1980), cert. denied, 101 S.Ct. 1028 (1981).

[102] It is also surprising in light of the fact that the ADEA ELI list contained in section 212 of the compliance manual specifically includes as an ELI issue discrimination resulting "from the use of non-job-related selection devices which have an adverse impact on older workers, e.g., a college degree requirement."

The Appellate Division's ADEA docket, including both appeals and *amicus* cases, reflects very careful planning and a conscious effort on the part of the Division to utilize its resources in a balanced manner, making a significant contribution to the development of ADEA case law. Since the EEOC assumed jurisdiction of the ADEA, it has filed 22 appeals and participated as *amicus* in 18 additional ADEA cases.[104] The Commission has established a presence in every circuit court in the Nation. In addition, its appellate and *amicus* cases reflect a good mix of both substantive and procedural issues.

Appendices VIII and IX provide a breakdown of the appellate cases in which the Commission has participated. Included among these are the following:

—*Thirteen cases* involving procedural issues (viz, sufficiency of proof to establish a *prima facie* case; equitable versus jurisdictional nature of the charge-filing requirement; statute of limitations for filing charges; adequacy of jury instructions; applicable statute of limitations and question of willfulness).

—*Six cases* arguing that application of the ADEA to State and local governmental employers is constitutional.

—*Six cases* involving refusals to hire (most pursuant to a maximum hiring age policy).

—*Six cases* involving mandatory retirement pursuant to a policy defended on the basis of the BFOQ exception; and

—*Six cases* involving the question of whether a pension or benefits plan was bona fide under the section 4(f)(2) exception.

In addition, at least one appeal or *amicus* brief has been filed with respect to each of the following issues:

—Whether EEOC, like a private plaintiff, has the right to demand a jury trial under the ADEA (the lower court had denied EEOC's demand).

—Whether a requirement that age-60 pilots exhaust their accumulated vacation leave prior to retiring, while other retiring pilots could obtain monetary reimbursement for unused vacation, violated the ADEA.

—Whether a collective bargaining agreement may waive individual rights under the ADEA.

—Whether the aged-based failure to credit for pension purposes work performed by the plaintiff between 1968 and 1976 violated the ADEA; and

—Whether the ADEA is violated if age is "any" factor motivating the adverse action, or whether it must be the "determining" factor.

Eleven of the appellate actions involved suits against public employers, with six of those alleging that maximum/minimum age policies were not BFOQ's for the jobs in question. Four others were private sector BFOQ cases; two of these challenged the refusal of airline companies to hire persons as flight officers if they were over age 35; the other two challenged the mandatory retirement of "private" pilots.[105] The Appellate Division's position has prevailed in 21 of the cases in which it has participated. It has been rejected in six, and 13 cases are still pending.

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[103] This is not to suggest that specialization is necessary with respect to any of the legal divisions.

[104] These statistics are based on a submission from the Appellate Division, included in exhibit 13.

H. COMMENTS ON OFFICE OF GENERAL COUNSEL ENFORCEMENT EFFORTS

(1) *The issues pursued through the Commission's litigation enforcement program may correspond too closely to those alleged in charges.* Appendix X provides a breakdown of the charges/allegations by issue filed with the Commission in fiscal years 1980 and 1981; there is also a breakdown of total numbers of lawsuits filed by issue. This exhibit reflects that the percentage of lawsuits filed with respect to each issue closely parallels the percentage of all charges/allegations of violations with respect to that issue. Discharge and layoff cases form the overwhelming majority of suits, and likewise account for an overwhelming majority of all charges.[106]

The significant correlation between issues alleged in charges and those pursued in litigation is in many ways a positive comment on the General Counsel's enforcement efforts. However, there are several potential drawbacks to structuring a litigation program which parallels charge filings so closely.

First, if individual charges form the primary source of litigation referrals, some age-based practices which—for whatever reasons—do not generate a lot of charges but which nonetheless have a significant impact on older workers will be left unredressed either by the Commission's administrative compliance activities or its litigation enforcement program. This would be especially true with respect to novel or unsettled issues of law.

Second, the charge-responsiveness of the litigation program may well result in the failure to represent various types or groups of older workers proportionately within the Commission's litigation portfolio. For example, the 1981 Harris survey found that awareness of the ADEA increased proportionately with higher educational achievement and professional advancement; it also found that men were substantially more aware of the ADEA than women.[107] Thus, less well-educated and lower status employees, as well as women, are far less likely to be aware of and take advantage of their ADEA rights than are those workers who are on the opposite end of the educational or professional spectrum, or men. However, it is also precisely the former who are less able to pursue private remedies and, thus, are most in need of governmental intervention on their behalf.

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[105] *Smallwood* v. *United Airlines, Inc.*, 661 F.2d 302 (4th Cir. 1981), cert. denied 50 U.S.L.W. 3948 (1982) (policy violates ADEA); *Murnane & EEOC* v. *American Airlines, Inc.*, 667 F.2d 98, cert. denied 50 U.S.L.W. 3802 (1982) (policy does not violate the ADEA); *Houghton and EEOC* v. *McDonnell Douglas*, 627 F.2d 858 (8th Cir. 1980) (forced resignation of private pilot violated ADEA); *Tuohy* v. *Ford Motor Co.*, 28 FEP cases 1116 (6th Cir. 1982) (improper for district court to decide applicability of BFOQ defense to mandatory retirement of test pilot at summary judgment stage).

[106] Further evidence that the Commission's litigation program is highly charge-responsive is in a letter dated October 31, 1981, from Edgar Morgan to Mike Batten. The Commission stated that: "In fiscal year 1979, of 16 cases filed, 3 resulted from directed investigations; of the remaining 13, one was an intervention. In fiscal year 1980, of 52 cases filed, 6 resulted from directed investigations (3 were interventions). In fiscal year 1981, of 89 cases filed, 1 resulted from directed investigation; 4 were interventions; the others were generated by direct charges."

Exhibit 4. Thus, 89 percent—139 of 157—of the cases filed were generated by charges. In addition to reflecting the charge-responsiveness of the litigation program, these figures are another graphic indicator of the significant decline in the level of directed activity since the Commission assumed jurisdiction of the ADEA.

[107] See "ADEA Awareness Varies Among Respondents," supra, footnote 9, at 224.

Finally, since one purpose of the Commission's litigation program is policy development through the establishment of sound legal precedents with respect to a number of issues, it need not follow precisely the concentration of charges. It is reasonable to conclude that substantially greater numbers of charges are filed in those areas where the case law is fairly well established, since complainants are more aware that those practices violate the ADEA. By contrast, where legal issues are unsettled and possibly complex—e.g., the bona fides of an employee benefits plan—potential complainants are far less aware that certain practices may violate the ADEA and thus are far less likely to file significant numbers of charges or private lawsuits.

The complexity, uncertainty, and cost of litigation involving these issues acts as a genuine disincentive to private enforcement initiatives. Thus, it is precisely in these areas that the Commission has a special obligation both to potential complainants and the courts to play an active and constructive role in the development of the case law. The Commission needs to assess carefully those issues on which sound case-law development is necessary and develop its litigation docket in a manner which is responsive not only to charge flow, but also to these case-law needs as well.

(2) *The Commission needs to assess carefully the ADEA litigation dockets of district offices as well as the national docket to determine whether they are balanced with respect to total numbers of lawsuits filed, types of respondents sued, and violations alleged.* Because the information supplied to the committee by the Office of General Counsel was incomplete,[108] it was not possible to determine precisely the total number of ADEA lawsuits filed by each district office. However, based on the 108 complaints reviewed, the chart at appendix XI was prepared; it compares the total number of lawsuits filed by each office to the ADEA charge intake in each. As that chart reflects, there were apparently ADEA litigation shortfalls relative to charge intake in a number of offices. Others had higher than would be expected ratios of litigation to charge filings.[109]

Relying again upon the 108 complaints submitted, an analysis was conducted of the nature of respondent sued by each district office. The chart reproduced as appendix XII reflects this information. Four offices' suits against public employers exceeded in number those against private employers. Five others sued equal numbers of public and private employers. This relatively high concentration of suits against public employers resulted, on a nationwide basis, in a litigation docket consisting of 43 percent public employer respondents and 57 percent private. The high percentage of public employer suits is explained in large measure because of the large number of suits involving police and firefighter age limits.[110] This 43 percent representation of public employers among all respondents in lawsuits varies substantially from their representation among all respondents named in charges. In both fiscal years 1980 and 1981, public employers were only 14 percent of all respondents named in charges.[111]

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[108] Despite its request for copies of all complaints in ADEA lawsuits, the committee received only 108—approximately two-thirds of the total; in addition, it received no quarterly MAP reports (see letter dated Mar. 25, 1982, exhibit 4).

[109] Actual litigation goals are negotiated office-by-office, and without the MAP's, it is not possible to tell whether, in fact, there were litigation shortfalls in the ADEA area. A Commission official recently stated that the MAP goals were being negotiated downward.

[110] The Commission has no jurisdiction to sue public employer under title VII. Thus, the ADEA suits provide an opportunity for the Commission to make its presence known from a litigation standpoint among public employers.

	Private employer		Public employer		Union	
	Number	Percent	Number	Percent	Number	Percent
Lawsuits	62	57	46	43	3	3
Charges:						
Fiscal year 1980 [1]	11,678	82	2,047	14	481	3.3
Fiscal year 1981 [2]	7,448	82	1,269	14	361	3.9

[1] Reflects allegations within charges.
[2] Reflects actual charges.

The excessive concentration of suits against public employers also results in substantially lower numbers of suits than might be expected in other sectors of the economy. Appendix XIII compares the numbers of charges filed within each industry (based on SIC categories) for both fiscal years 1980 and 1981 with the numbers of lawsuits filed per industry. Not surprisingly, the exhibit reflects the following significant disparities: *Manufacturing:* 28 percent of charges, 18 percent of lawsuits; *trade/retail:* 11 percent of charges, 2 percent of lawsuits; *services:* 21 percent of charges, 13 percent of lawsuits; and *public administration:* 12 percent of charges, 43 percent of lawsuits.

Thus, the three industries which accounted for nearly two-thirds of charge intake accounted for only one-third of agency litigation. By contrast, public employer suits exceeded public employer charges by 350 percent.

Based on these analyses, it appears that the Commission's litigation program is disproportionately oriented toward public employers, at the expense of more substantial enforcement activity in the private sector. This raises serious concerns about the balance of its litigation docket.

(3) *The excessive number of lawsuits filed in police and firefighter age cases operates to the detriment of the rest of the litigation program.* Litigation resources are limited. They are becoming more limited. Thus, to the extent that any one issue or one area of the law dominates the Commission's litigation enforcement effort, it does so to the detriment of other issues which share an equal degree of intrinsic significance and which may well impact on substantially greater numbers of older workers. Nearly one-quarter of the Commission's ADEA litigation docket consists of cases challenging age rules for police and firefighter jobs. There is no question that these cases raise significant legal and policy issues. Nor is there any question that it is the role of the Commission, in the first instance, to develop its own litigation strategy. But the appropriate—and critical—question during oversight is whether that litigation strategy operates to preclude the institution of numerous other suits in areas where the need is equally great. In this instance, it appears that it may have.

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[111] These figures were reached through the charge-filing data contained in exhibit 12 and a review of the 108 complaints submitted by the Office of General Counsel. They show the following:

The figures cited in No. (2) above attest to the extreme "underrepresentation" of suits within specific industries, despite the relatively high proportion of charges. As a case in point, not one of the 108 complaints reviewed was a suit against a restaurant, despite the fact that many restaurant chains are notorious for their refusal to hire older women as waitresses (the services category, under which restaurants fall, constituted 21 percent of all charges but only 13 percent of all suits). Other concrete examples could be provided. The point is clear—once Commission litigation resources have been dedicated in substantial measure to prosecuting primarily certain types of offenders or offenses, other equally meritorious claims remain untouched.

Commission attorneys argue, not without force, that it is necessary to file substantial numbers of the police/firefighter cases because so many of them settle prior to trial. Indeed, they point out that of the 12 or so police/firefighter cases filed by the Department of Labor, only one resulted in a decision on the merits; the rest were settled. Similarly, the Commission has settled substantial numbers. On the other hand, the high settlement rate would seem also to indicate that voluntary compliance might be achieved were the Commission to employ some other type of enforcement strategy, other than litigation. (See discussion on section 9 exemption and rulemaking authority on page 63.) The General Counsel's Office, of course, is not in the position to develop Commission compliance strategy except to the extent that litigation constitutes a component of that strategy. But it is clear that the Commission needs to reassess its strategy in the area of police/firefighter cases to determine whether its litigation resources are being utilized as effectively and as equitably as possible.

(4) *The Commission should reconstitute the ADEA Litigation Strategy Task Force for purposes of determining and directing appropriate litigation strategy.* The litigation strategy group assembled to develop title VII strategy with respect to certain issues played a pivotal role in the Commission's prosecution of spousal benefits pregnancy cases. The group also addressed specific areas of concern which arose in title VII litigation generally. A similar committee to develop ADEA litigation strategy, focus on problems unique to ADEA litigation, and coordinate planning of ADEA litigation among district offices would be an invaluable asset to the Commission's ADEA enforcement program. Importantly, such a task force could bring together representatives from various divisions within the agency, who would assure that the functions of compliance side enforcement, policy development, and litigation were conducted in an integrated fashion.

(5) *The Commission should review the institutional structure of the Office of General Counsel to determine whether establishment of a discrete ADEA unit would enhance its litigation enforcement efforts.* The Commission's age litigation program has no distinct organizational identity whatsoever. Rather, when the enforcement function was transferred to the EEOC, the age attorneys were simply moved into title VII units. While they have always worked exclusively in the age area, it may well be that with the growth of the ADEA litigation docket it would be appropriate to create a separate age unit within the Trial Division. The creation of a separate unit would give ADEA issues greater visibility, facilitate monitoring, and effectuate the development of policy through litigation. Such a unit might also enhance the Commission's ADEA "systemic" enforcement posture. As discussed on

page 36, there is a title VII systemic program which operates through discrete units in headquarters and the field. Within the headquarters unit, there are substantial numbers of attorneys whose sole function is to litigate title VII systemic cases. There is no corresponding unit for or dedication of resources to the development and litigation of ADEA systemic cases. While establishment of an ADEA trial division litigation unit would not in itself assure the development of an ADEA systemic program, it would significantly elevate the status of the ADEA litigation program as a whole. With the corresponding greater visibility and significance that would attach to that unit, an increased focus on systemic activities would be likely to follow.

(6) *The Commission needs to make greater use of its combined enforcement authorities through its litigation program.* Transfer of the ADEA enforcement authority to the Commission placed it in the unique position of being able to combine enforcement efforts under various statutes. The administrative compliance procedures attempt to capitalize on this coordinated authority in two ways. First, at intake EOS's counsel charging parties of their rights under both title VII and the ADEA. As a result, substantial numbers of concurrent ADEA/title VII charges have been filed. Second, the proposed procedural regulations provide that where investigations are being conducted under one statute and information is discovered which leads the Commission to conclude that there has been a violation of another statute it administers, the Commission may use those means available to it to expand the charge to encompass both statutory bases.[112]

Despite the coordination at the compliance level, there appear to have been no lawsuits "dually" filed under both the ADEA and title VII. Again, none of the 108 complaints reviewed alleged violations of both statutes. By contrast, title VII and EPA claims are routinely joined. It is true that there is extensive overlap between title VII and the EPA. But such overlap probably also arises in many instances in which older women or minorities are the victims of age and sex/race discrimination.[113] The Commission should explore the extent to which such dual bases of discrimination exist and, where they do, develop litigation strategies which maximize the use of its dual enforcement authorities.

(7) *The Commission should increase its efforts to track private ADEA litigation and provide assistance to the private bar.* The Trial Division of the Commission engages in no tracking of private litigation under the ADEA.[114] Nor has it, in the past, provided direct assistance to the private bar engaged in litigating ADEA suits. By contrast, until recently the Commission operated a private bar loan fund as well as a general technical assistance program (ABAR) under title VII. Both programs have now been abolished.

The Office of Special Programs, which previously administered the loan fund and ABAR, has recently conducted a nationwide survey to determine the training needs of local attorneys, as well as their willingness to be placed on district office referral lists. ADEA training was included among the topics listed on the "needs" survey. The results of these surveys are currently being tabulated. Whether and what additional followup action is planned by the Commission is not currently known. Because the ADEA is a relatively newer statute than title VII, however, it would be appropriate for the Commission to offer some technical assistance to members of the private bar who wish to become involved in ADEA litigation.

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[112] See exhibit 8, Proposed ADEA Procedural Regulations.

[113] The classic example—were it not for the Commission's policy—would be age limits on admission to apprenticeship programs. Because of prior discrimination in the crafts against blacks and women, many were excluded from admission to apprenticeship programs when they met the age-eligibility requirements. Now, many who might wish to enroll in such programs are too old. The age limit thus has the effect of perpetuating past race/sex discrimination, as well as barring entrance solely on the basis of age. Other examples include standardized test requirements, and college or advanced degree requirements which have an adverse impact both on older workers and minorities.

[114] The Appellate Division apparently engages in some tracking, as is manifested in part by its *amicus* work.

(8) *The Commission needs to develop routine reporting instruments for monitoring the activities of the Office of General Counsel.* The Commission currently does not utilize any monitoring instrument to determine the numbers or types of cases submitted to the General Counsel for litigation approval or the action taken on those. By contrast, such "progress" reports are prepared on a periodic basis by the Office of Field Services, reflecting various types of compliance actions for which it has oversight responsibilities. A similar periodic report from the Office of General Counsel would be an invaluable asset in enabling the Commission to determine the numbers and types of cases recommended for litigation approval; the quality of those cases; actions taken by the General Counsel; and whether the policies or enforcement strategies which the Commission wishes to develop or implement through litigation are being effectively pursued. In addition, a report of this nature would enable the Commission to assure that the only substantive enforcement vehicle at its disposal—litigation—is utilized in a manner which is equitably balanced with respect to issues, protected classes, and type of employers sued.

Chapter 5

COMMISSION POLICY DEVELOPMENT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

The organizational structure and resources devoted to policy development under the ADEA are vastly different and inferior to those established for title VII. As a result, policy development under the ADEA has suffered.

A. Organizational Structure

The starting point for discussing ADEA policy-development structure is that which exists under title VII, since the differences demonstrate graphically the Commission's failure to accord the policy role under the ADEA a sufficiently high priority. For title VII, there is a separate Office of Policy Implementation (OPI) staffed solely by lawyers, whose function is to develop title VII policies, as reflected through guidelines,[115] interpretative compliance manuals,[116] and decisions in individual cases for which there is no existing Commission precedent (non-CDP) or which involve issues that the Commission has decided to determine on a case-by-case basis.[117] The Director of OPI, like any other division head, reports directly to the Chair, through the Executive Director. Thus, the policy development function under title VII is highly visible and from an organizational standpoint enjoys a status equal to that of any other division within the agency.

The ADEA policy development model stands in sharp contrast to that under title VII. Virtually all policy under the ADEA emanates from the Legal Counsel Division of the Office of General Counsel and is the responsibility of four staff attorneys and one supervisor, who assume the full complement of other Legal Counsel duties as well. These include defense of the agency in suits filed against it; drafting agency determinations with respect to Freedom of Information and Privacy Act requests; acting as the agency's "ethics" officers; reviewing policy instruments distributed by the Office of Policy Implementation; and otherwise performing those functions which normally fall to an agency's house counsel. While the unit functions very competently and has gained a substantial amount of age expertise, it is simply unrealistic to assume that any agency personnel could juggle all the routine responsibilities imposed on Legal Counsel staff and at the same time accord the high priority to ADEA policy development that it warrants. Indeed, the agency structure does not permit it. The end result is that, unlike title VII where there is an entire unit devoted to nothing but policy development, under the ADEA there is not only no single unit for policy development, but there is not even one individual who may devote his/her time exclusively to addressing policy issues.[118]

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[115] The Commission does not have the authority under title VII to issue binding rules and regulations. However, its guidelines are often relied upon by courts and the Supreme Court has noted in the past that they are entitled to great deference. See *Griggs* v. *Duke Power Co.*, supra, footnote 84.

[116] Volume II of the EEOC Compliance Manual provides substantive title VII guidance.

[117] Where charges raise issues with respect to which there is Commission decision precedent (CDP), decisionmaking authority is delegated to the district directors.

An additional ramification of the very different organizational structures for policy development under title VII and the ADEA is that the fine-honed distinction between policy/decisionmaking and enforcement roles that exists under title VII is obliterated under the ADEA. Under title VII, the organizational structure operates effectively to preserve this distinction because OPI is a discrete unit within the agency that reports to the Commission and not the General Counsel. While the General Counsel routinely reviews policy instruments proposed by OPI, her/his only recourse is to the Commission if s/he disagrees with the proposals. In that regard, s/he may advise the Commission, but s/he is not a decisionmaker. By contrast, under the ADEA, the policy-development function is lodged squarely within the General Counsel's office. This gives the General Counsel a far greater role in actual *policymaking* (as opposed to advising) than is authorized for title VII, or contemplated by the Commission's decisionmaking structure, or—for that matter—than has historically been provided under the ADEA. Longstanding delegations of authority under the Age Act made clear that the Administrator of the Wage and Hour Division, and *not* the *Solicitor of Labor*, was the appropriate official to issue DOL opinion letters,[119] which enunciated agency policy with respect to various ADEA issues. As is true under title VII, this delegation of authority was designed to reflect the very unique and distinct functions of the policymaking and enforcement branches of the agency.

B. ACTUAL POLICY DEVELOPMENT UNDER THE ADEA TO DATE

Appendix XIV provides a fairly detailed outline of the various policy initiatives undertaken by the EEOC to date, including both a summary of each initiative and a chronology of its development. Briefly, the major actions taken of a policymaking nature are as follows:

—*Publication of final interpretations under the Age Discrimination in Employment Act, 29 C.F.R. 1625.*

These interpretations essentially recodified the existing Department of Labor Interpretative Bulletin. The final interpretations made some editorial changes, deleted certain examples which Labor had provided in the BFOQ section, and attempted in some respects to harmonize the ADEA interpretations with those under title VII (e.g., requiring that selection devices having adverse age-based impact have to be validated in accordance with the title VII Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. 1607; providing that a seniority system which is not bona fide under title VII will be carefully scrutinized to determine its bona fides under the ADEA as well).

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[118] Some personnel in the Office of Field Services Age and Pay Unit also participate extensively in the development of policy under the ADEA, though that is not their primary responsibility. In the past, the Office of Policy Implementation has not been very much involved in ADEA policy development.

[119] Delegation of authority, Reorganization Plan No. 6 of 1950, 64 Stat. 1263.

The regulations were published in proposed form on November 30, 1979 (44 F.R. 68858). Final publication was on September 29, 1981.

—*Pension accrual after normal retirement age and related issues.*

When the Commission published the ADEA interpretations in proposed and final form, it specifically reserved for later publication section 1625.10, which dealt with costs and benefits under employee benefits plans. That reservation stemmed from the Commission's ongoing reconsideration of the DOL interpretation which provided that postnormal retirement age pension accrual (or contributions) is not required under the ADEA. Commission staff had long proposed reversal of the Labor Department's position and had drafted a series of recommendations as to possible regulatory alternatives. However, despite the fact that formal reconsideration of this issue was initiated shortly after the transfer of authority, the Commission never voted on any staff proposals. And indeed now, nearly 3 years later, the agency's former General Counsel formally recommended that the Commission adopt the existing Labor Department interpretation.[120]

—*Age limits for admission into bona fide apprenticeship programs.*

In its proposed interpretations of the ADEA, the Commission also reserved publication of an interpretation with respect to the applicability of the ADEA to bona fide apprenticeship programs, pending formal reconsideration of the Labor Department position that age limits for admission into bona fide apprenticeship programs were not intended to be affected by the ADEA.

After extensive reconsideration, the Commission voted in the spring of 1980 to rescind the existing Labor Department rule and propose instead that the fixing of age limits for admission into apprenticeship programs was barred by the ADEA. That vote was subsequently set aside for further reconsideration.

Finally, in September 1980, the Commission published a proposed rule reversing the Labor Department position. However, in July 1981, the Commission, by a tie vote, continued in effect the existing Labor Department exemption, which was then published in final form with the final ADEA interpretations published in November 1981.

—*Maximum hiring age and minimum mandatory retirement age for law enforcement officers and firefighters.*

Beginning in March 1980, the Commission contracted for studies to measure the appropriateness or necessity of fixing maximum/minimum ages in police and firefighter jobs. The results of the studies were reported to SCEP (Staff Committee on Employment Policy) in August 1980. During the pendency of the studies, the Commission sought and obtained stays in most of its pending ADEA suits involving those jobs and issues.

Also included in the memorandum to SCEP was a discussion of the enforcement options available to the Commission with respect to police and firefighter cases. Three options were proposed as viable alternatives: Publication of guidelines similar to those utilized in title VII; invocation of the section 9 exemption authority to hold hearings and publish a final rule; or litigating on a case-by-case basis. The staff memo recommended either the guideline or the section 9 exemption route as the most effective and cost-efficient enforcement approach. However, the Commission opted to pursue its litigation strategy instead.

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[120] The Commission has been sued twice with respect to these regulations. The first case was dismissed for lack of ripeness. The other is still pending.

In addition to consideration of the above policy issues, the Commission has also promulgated five informal advice letters to specific addresses (appendix XIV), and testified before the Panel on the Experienced Pilots Study, National Institute on Aging, stating its opinion that, "Choosing age 60 for mandatory retirement of commercial pilots is unwarranted" on the basis of medical evidence and the proper legal test for establishing a BFOQ (appendix XIV). Finally, the Commission currently has under consideration issues relating to the legality of early retirement incentive plans and the proper beneficiaries of added savings resulting from an employer's authorization to reduce certain benefits to employees eligible for medicare. With respect to the former, the Office of General Counsel has recently prepared and submitted for Commission approval the first formal opinion letter proposed for publication under the ADEA since the EEOC assumed jurisdiction. Appendix XIV contains a summary of the medicare savings issue.

C. COMMENTS ON COMMISSION POLICY DEVELOPMENT

(1) *The Commission needs immediately to accord its policy development responsibility under the ADEA a significantly high priority, through the designation of appropriate staff and assignment of sufficient resources.* The ADEA is a newer jurisdiction than title VII and one with which most interested parties—including the courts, the public, respondents, and the Commission—are manifestly less familiar. Case law is still evolving, with the full extent of substantive rights and remedies still unexplored. Against this backdrop, it is essential that the Commission begin immediately to accord the ADEA policy development function a much higher and more visible priority than it has enjoyed in the past, in order to assist the courts in their task of interpreting the law, enable its own staff to enforce the law better, and advise both charging parties and respondents as to the scope and effect of the law.

While very few experienced personnel transferred from the Department of Labor to EEOC headquarters, there is a sufficient body of inhouse expertise to devote staff on a full-time basis to the exploration of issues under the ADEA and the development of policy guidance with respect to those issues. Whether these staff should be assigned to the Office of Policy Implementation or elsewhere is beside the point—there exists a compelling need for identifying a group of employees whose primary, if not sole, function will be the development of ADEA policy.[121] The Commission's failure to do this to date has impacted on policy development under the ADEA in two critical ways. First, the Commission has made no real policy innovations whatsoever under the ADEA. While it has targeted certain issues for special review and consideration, in the end it has virtually recodified verbatim existing Labor Department interpretations. There is nothing inherently wrong with this, but one questions whether the same results would have obtained had the policy function enjoyed a more visible and discrete role within the agency.

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[121] The organizational structure itself should be determined by the EEOC, but in accordance with the discussion, supra, at 74, regarding the separation of policymaking and prosecution functions, it is essential that the ADEA policy-development unit report directly to the Commission. This is presumably the Commission's ultimate intent, since in section 1626.17 of its proposed procedural regulations, it provides that formal opinion letters will be signed by the General Counsel *on behalf of the Commission.* This parallels the Commission's procedures under title VII as well.

Second, Commission policy development under the ADEA has been excruciatingly slow and indecisive. Again, with respect to issues like apprenticeship and postnormal retirement age pension accrual, the Commission has sent out conflicting signals over a period of several years, while ultimately adopting (or proposing adoption of) existing Labor Department positions. With respect to all of the Commission's policy initiatives, though most were initiated in fiscal year 1979, none were finalized until the end of fiscal year 1981 or beginning of fiscal year 1982. This delay might be more understandable had the Commission blazed new trails, but it has not.

None of this is to suggest that the staff involved in policy development under the ADEA are lacking in competence or imagination. They are, to a person, very skilled and committed to the act's enforcement. Their proposals have reflected a precise understanding of the ADEA and careful consideration of various policy options. However, most of their efforts have been for nought because institutionally the Commission has simply failed to accord the ADEA policy development function the status it ought to enjoy. The Commission must accord a significantly higher priority to ADEA policy development in order to address these problems.

An equally compelling reason for elevating the status of policy development under the ADEA is to assure that the act's interpretation and enforcement not be vulnerable to turnover in management positions, budgetary restrictions, or litigation shortfalls. Under title VII there is not only a well-established body of case law but also longstanding Commission policy precedent with respect to numerous issues. By contrast, under the ADEA, precedents are still evolving. Much Commission ADEA decisionmaking appears to be made on an ad hoc and random basis. This not only limits the extent to which outside parties may look to the Commission for guidance, but also undermines the integrity of the Commission's processes. In addition, it gives a disturbing impression of a lack of concern for and responsiveness to the issues confronting older workers. Thus it is essential for the Commission, as a body, to assume immediately a decisive and affirmative policymaking role under the ADEA.

(2) *The Commission has failed to use its section 9 rulemaking authority to effect rational policy development.* Section 9 of the ADEA authorizes the Commission to:

> Issue such rules and regulations as [it] may consider necessary or appropriate for carrying out [the] act, and [to] establish such reasonable exemptions to and from any or all provisions of [the] act as [it] may find necessary and proper in the public interest.[122]

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[122] The section 9 authority is to be exercised in accordance with the requirements of the Administrative Procedures Act, 5 U.S.C. 501 et seq.

The Commission has dealt with two policy issues with respect to which it contemplated, but rejected, the use of its section 9 rulemaking authority. The first was the BFOQ exception for age limits in police and firefighter cases. Staff recommended that the Commission develop its policy on this issue through its section 9 authority, but the Commission opted instead to pursue a case-by-case litigation strategy. As discussed on page 55, this decision resulted in an inefficient use of agency litigation resources. It also reflected an unwillingness on the part of the agency to explore fully the range of ADEA policy development vehicles at its disposal.

The other issue with respect to which the Commission could have resorted to its section 9 authority was age limits for admission into apprenticeship programs. Since section 9 specifically empowers the Commission to issue "exemptions to and from * * * the act" that are "necessary and proper in the public interest," the Commission could have exercised its discretion to determine whether the apprenticeship exemption was indeed "necessary and proper." In fact, there is some indication that establishing the exemption without complying with the Administrative Procedure Act rulemaking requirements [123] was an invalid exercise of agency discretion. Several lawsuits have been filed in the past challenging the manner in which the Department of Labor had originally promulgated this "exemption"; none reached a decision on the merits. Thus, courts have ruled neither on the legality of the exemption per se nor on the manner in which it was adopted. And the Commission, likewise, sidestepped this issue. While the question of compliance with the section 9 requirements was raised during final consideration of the apprenticeship issue, the Commission explicitly declined to pursue that option.[124]

This failure even to hold hearings under the ADEA contrasts sharply with the Commission's practice under title VII.[125] In recent years, the Commission has held extensive hearings on testing and selection procedures and validation practices; religious discrimination; and sex-based occupational segregation and wage discrimination. Title VII does not authorize the Commission to issue binding rules; thus, the hearings were not rulemaking proceedings. At the same time, however, they were utilized as an effective adjunct to agency policy development. Voluminous records were amassed as the result of each hearing and were relied upon in the drafting of guidelines. The religious discrimination guidelines, for example, refer specifically to the Commission's public hearings.[126] Similar kinds of informational hearings or more specific rulemaking proceedings would also be of great assistance in the area of ADEA policy development. Especially because the age jurisdiction is a developing one, it is essential that the Commission explore fully the range of policymaking options at its disposal. Thus, the Commission should carefully consider issues with respect to which it would be appropriate (or necessary) to conduct rulemaking proceedings under section 9 and develop a strategy defining the manner in which these procedures will be called into play and utilized.

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[123] Ibid.

[124] See Letter of Daniel E. Leach, Vice Chairman, to Senator John Heinz, dated July 28, 1981 (exhibit 4).

[125] The Commission has recently conducted two public informational hearings about the ADEA, one in Los Angeles and one in Kansas City. They were not rulemaking proceedings, however, nor were they designed to provide information with respect to any issues currently under consideration for guideline development.

[126] 29 C.F.R. 1605.

(3) *The Commission has apparently not engaged in a careful program of tracking charge filing to determine the nature and extent of age discrimination within various industries or among various age groups.* The Commission submitted two sets of documents to the committee which could be utilized to determine the incidence of charge filing within specific age bands and among various industries. The first, contained in exhibit 12, provides a fiscal year 1981 breakout of charges filed according to issue, 5-year age bands, and sex. Similar information was requested with respect to race, but the Commission advised the committee that it does not maintain a racial breakdown of this information. The second set of documents, also contained in exhibit 12, shows the incidence of charge filing within specific industries. For fiscal year 1980, national totals broken down into 5-year age bands were provided; for fiscal year 1981, both national and district/area office totals were provided.

Information of this nature is very important for structuring enforcement strategies and developing policies responsive to problems unique to an industry, or affecting one age group or one sex more than the other. It does not appear, however, that the Commission has actively attempted to use this information for either of these purposes.

The charts in appendix XV are designed to reflect relevant patterns of age discrimination which may be discerned from review of the Commission's computerized data. They show, inter alia, that:[127]

> *The incidence of age discrimination is highest in the age 50 to 59 range.* Among women alleging age discrimination, it steadily increases from age 40 to 54; tapers off between 55 to 59; and then falls dramatically beginning at age 60. For men, there is a corresponding substantial increase in filings during each 5-year age band from age 40 to 54 with a continued increase to age 59. Indeed, in the 55 to 59 age band the percentage of "all male charges" exceeds that of "all female" for the first time. Then, while charge filing among men decreases after age 60, the drop is not as substantial as among women. (Appendix XV–A.)
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> While the absolute number of ADEA charges filed by men exceed those filed by women with respect to every issue except "terms and conditions," *certain types of practices appear to present greater problems for women than men.* For example, although the percent of allegations by women equaled only 64 percent of men, men and women alleged an almost equal number of denials of promotion. Thus, *discriminatory denial of promotion is a more prominent problem for women than for men.* Other allegations asserted by women with a higher incidence than would be expected are wages; training; and terms and conditions. For men, particular problems are refusal to hire and benefits. (Appendix XV–B.)
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> At ages 40 to 44, women account for approximately 41 percent of all ADEA charges. The relative proportion of male to female charges remains fairly constant through age 54. At age 55, even though absolute numbers of women's charges are still increasing, their percentage of total charges

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[127] See exhibit 12 for background documents.

begins a sharp decline because of the much more substantial increase in male charge filings during the 55 to 59 age band. This decline in the ratio of female to male charges continues in the 60 to 64 age band; at age 65, the proportion of female to male charges rises again. (Appendix XV–C.)

Within industries, the percentage of ADEA charges is highest in the manufacturing sector, followed by services, public administration, trade/retail, and transportation. All other industries account for a small portion of ADEA charges. (Appendix XV–D.)

Between fiscal years 1980 and 1981, the incidence of charge filing increased most substantially in the services sector. Retail trade also showed a very sizable increase. (*Note:* Manufacturing had a greater increase in actual numbers of charges filed.) (Appendix XV–E.)

With respect to the incidence of age discrimination allegations in 5-year age bands within industries: *Manufacturing* shows a steady but small increase until age 55, where the incline is steep, followed by a precipitous drop; *transportation* allegations increase steadily from ages 40 to 59 and then begin to drop at about the same pace in the 60 to 64 bracket, followed by a sharp decline in the 65 to 69 bracket; in *trade/retail*, the incidence of charge filing is highest in the age 50 to 54 bracket, followed by a steady decline; in *services*, the pattern of charge filing is most even of all industries, with small but steady increases until age 60, followed by a slight decrease and then a sharp fall in the 65 to 69 bracket; finally, in *public administration*, the charge filing patterns correspond closely to that in service, except the incidence in the 40 to 44 age group is lower. (Appendix XV–F.)

These analyses are by no means exhaustive, nor are they designed to suggest the manner in which the EEOC should shape its policy development or enforcement strategy. What they do suggest, however, is that there is currently a wealth of material available to the Commission from which it could conduct searching analyses to determine the nature and scope of age discrimination. This information could, in turn, be used to structure innovative policy strategies or enforcement approaches. It does not appear that the EEOC has attempted to use this information in this manner.

(4) *The Commission needs to identify potential areas of conflict between title VII and ADEA policy and develop plans for addressing and resolving those conflicts.* One of the primary concerns militating against transfer of the ADEA jurisdiction to the Commission was a fear that the Commission's preoccupation with title VII would preclude it from devoting adequate resources to ADEA enforcement. While that does not appear to have happened (except in the policy area), the Commission has failed to identify potential areas of conflict between title VII and the ADEA and develop a mechanism for resolving those conflicts.

Three such areas of conflict can be identified immediately. The first is the apprenticeship issue. The sole motivating factor which resulted in the Commission's decision to reaffirm the existing Labor Department exemption from ADEA coverage of apprenticeship programs was the conviction on the part of two Commissioners that lifting the age ban would operate to limit apprenticeship opportunities for minority youth. While this is by no means a specious argument or an insubstantial concern, the Commission's resolution of the issue reflects a policy decision more responsive to title VII concerns than to those under the ADEA. That the Commission reached this conclusion without the full benefit of section 9 hearings or without undertaking any precise study of the impact on minority youth of lifting age limits as opposed to the impact on older workers of retaining them may signal to many a disregard for the rights of older workers. It certainly signals a conscious skirting of the conflicts between the two statutes and a failure to take an up-front approach in dealing with them.

Another area in which policy conflicts are likely to surface is layoffs based on a "last-hired, first-fired" principle. While it is clear that under title VII, layoffs pursuant to a bona fide seniority system do not violate the act even if they have a disparate impact on women and minorities,[128] the Commission has consistently encouraged employers to develop strategies for reducing their payrolls which do not result in such a disproportionate impact on title VII protected groups.[129] At the same time, under the ADEA the Commission has recognized that the primary indicium of a seniority system's bona fides is the extent to which "length of service" determines rights and benefits of employees. Thus, the Commission—for sound reasons—looks in two directions with respect to seniority systems and seniority overrides under title VII and the ADEA. But the potential for conflict is clear. And while it may not yet have been raised in any concrete situation, it is extremely likely to arise in the future. The Commission needs to address this potential conflict and develop strategies for resolving it on something other than an *ad hoc* basis.

The final—and somewhat related—potential conflict area involves employer voluntary early retirement programs. Increasingly in the future, employers will seek Commission approval of such voluntary programs and will undoubtedly argue that these plans have been developed, in part, to preserve affirmative action gains of women and minorities. Again, the potential for conflict when the Commission reviews these plans is clear: Will the Commission carefully scrutinize the plans to assure compliance with the ADEA or will it be concerned first and foremost with the impact of its disapproval of such a plan on the career opportunities of minorities and women? Since the Commission bears an equal responsibility for all protected classes, it is essential that it develop mechanisms for assuring that this, and similar conflicts, are resolved equitably and reasonably.

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[128] *International Brotherhood of Teamsters* v. *U.S.*, 431 U.S. 324 (1977).

[129] See Commission statement on layoffs and equal employment opportunity, 45 F.R. 60832 (Sept. 12, 1980) (exhibit 15). The Commission also noted in this statement that layoff policies often operated to the disadvantage of older workers.

Chapter 6

RECENT DEVELOPMENTS AT THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: ADDITIONAL AND CONCLUDING COMMENTS

Since the ADEA is a jurisdiction newer to the Commission and the courts than either title VII or the EPA, administrative actions that appear arbitrary or counterproductive may have a much more substantial impact on ADEA enforcement than on enforcement under the other statutes. In this regard, several recent developments at the Commission give rise to a great deal of concern about the agency's conduct of its enforcement responsibilities. A situation of critical dimensions which has been alluded to earlier (see page 54), is the extreme shortfall in ADEA litigation during this fiscal year. While some of that shortfall may be accounted for in part by the Commission's lack of a quorum during much of the first quarter and budgetary cutbacks,[130] the substantial reduction in ADEA filings should be investigated immediately by the Commission.

As a result of the substantial concern that EEOC ADEA litigation activity was declining precipitously, a recent review of two sets of litigation documents was conducted. The first set consisted of ADEA presentation memoranda submitted by field offices for litigation approval between October 1, 1981 and March 25, 1982. The committee originally requested that the EEOC submit copies of all these presentation memoranda, together with the following information on each:

(a) Action taken by (1) General Counsel, and/or (2) Commission.

(b) If not approved for litigation, reasons for disapproval (or for deferral of decision to recommend approval).

(c) If approved for litigation, date of approval and current status.

The Commission's Office of General Counsel expressed concern about submitting these documents to the committee, for fear that confidential information might thereby be disclosed publicly. To accommodate these concerns, committee staff agreed to review the presentation memoranda in the EEOC General Counsel's office.

The review of 22 presentation memos was conducted on June 28, 1982. Of that number, seven were recommended to the Commission for litigation approval while four were returned to the district offices for further development (i.e., investigation or rewriting) and resubmission; eight were rejected by headquarters staff (i.e., not recommended for "approval" to the General Counsel) because of perceived evidentiary or procedural problems with the cases; and three were rejected solely by the General Counsel himself (i.e., against the recommendation of his headquarters ADEA staff). No reasons were specified for the General Counsel's unilateral disapproval of these three cases. Two of these cases alleged ADEA violations by public employers; one raised an individual demotion and termination claim, while the other challenged a collective bargaining agreement which provided for salary increments of $400 for individuals with 20, 25, and 30 years of service but only $200 for 35 or 40 years of service. The third case rejected by the General Counsel involved a private employer's denial of severance pay to employees eligible for retirement (age 50 with 10 years of service).

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[130] The Fiscal Year 1982 Management Plan projected that budgetary reductions would result in an overall decrease of 10 percent in new lawsuits during fiscal year 1982. Exhibit 9, p. 52. The current rate reflects a reduction far in excess of the anticipated 10 percent decline.

The method of reviewing the presentation memoranda—i.e., onsite in the General Counsel's offices—was unsatisfactory and not particularly instructive for a variety of reasons. First, the only indications on the presentation memoranda themselves as to final action taken were the handwritten notes of reviewers, including the General Counsel. Many of these notes were cryptic at best; indeed, the three cases unilaterally rejected by the General Counsel contained no specification as to his reasons for rejection. Second, several Equal Pay Act and title VII memoranda were in the pile of ADEA memoranda. This gave rise to concerns with respect to the care exercised in assembling the memoranda and the thoroughness of the submission. Third, the memoranda do not specify the dates on which the cases had been recommended for litigation. Nor do they specify the date on which litigation was authorized or filed or the date by which cases referred to district offices for further development were to be resubmitted to the Commission. They also did not provide any information on the current status of cases. The resulting inability to fix any dates with certainty compounded the concerns about the completeness and accuracy of the submission.

The combination of these three factors rendered this particular review an unproductive oversight tool. This is not to suggest, however, that an analysis of presentation memoranda is not a worthwhile component of the oversight process; it is. In the future, however, the committee should require both the actual submission of the presentation memoranda sought, as well as the detailed followup information requested with respect to each.

The second set of litigation-related documents provided information that was far more useful. The committee had access to the minutes of Commission meetings from October 1, 1980 until July 1, 1982. The minutes from the closed sessions of those meetings provide a breakdown of the total number of cases recommended and approved for litigation under each statute. Based on those minutes, the charts at appendix XVI were prepared. They confirm a dramatic and disturbing decline in the cases authorized for suit since October 1, 1981. The charts reflect, for example, that during the third quarter of fiscal year 1981, the General Counsel recommended and the Commission approved suit in *64 title VII* cases, *28 ADEA* cases, and *16 EPA* cases. By contrast, during the third quarter of fiscal year 1982, the Commission approved the filing of only *22 title VII* cases, *6 ADEA* cases, and *4 EPA* cases. On the average, during each of the first three quarters of fiscal year 1981, the Commission approved the filing of 45.6 title VII suits, 16.7 ADEA suits, and 12.3 EPA suits. During each of the first three quarters of fiscal year 1982, however, the Commission authorized suit on the average in only 17.6 title VII cases, 6 ADEA cases, and 7.3 EPA cases. A further disturbing and surprising fact about ADEA litigation authorizations in particular is that the highest number of ADEA authorizations for fiscal year 1982—seven—occurred in the first quarter of that year. During much of that period, the Commission acted without a quorum and the new General Counsel had only recently assumed his position. In view of these handicaps, it would have been reasonable to assume that ADEA-litigation authorizations would have suffered a shortfall during that period with a corresponding substantial increase during the second and third quarters. In fact, however, only five ADEA cases were approved in the second quarter and six in the third. Should the Commission maintain this current low level of ADEA litigation authorizations, its enforcement program will be seriously undermined. The Commission must address itself immediately to these very serious and damaging shortfalls in its litigation program.

Reported recent transfers and personnel reassignments as well as other actions by the Commission Office of General Counsel have generated a great deal of adverse publicity and extensive public concern. (See appendix XVII.) In particular, seven regional attorneys were recently transferred to new assignments, with only three working days notice. In a time of extreme budgetary shortages, combined with increases in charge filings, any personnel moves of such a scope should be carefully scrutinized to determine both their necessity and the attendant cost and benefits to the agency of such action. Such widespread and precipitous personnel changes have in the past seriously undermined the Commission's effectiveness as an enforcement agency. In 1976, commenting on similar types of personnel changes and turnover in the positions of Chairman and Executive Director, the General Accounting Office stressed that:

> Since its inception, EEOC has had frequent turnover in the positions of Chairman and Executive Director, with attendant staff turnover in other top level jobs. * * * *Such turnover was a major factor adversely affecting EEOC's effectiveness in achieving its operating objectives.*
>
> * * * Both EEOC officials and the news media have indicated that political considerations were involved in at least some of the turnover in the positions of Chairman and Executive Director.
>
> With each turnover there is a certain amount of disruption, particularly at the headquarters level. * * *
>
> During our field work, we noted that district offices had been slow to respond to several program innovations directed by EEOC headquarters. According to several midlevel EEOC officials, frequent turnover in the positions of Chairman and Executive Director had created an uncertainty of direction which inhibited the responsiveness of EEOC managers to program changes.[131]

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[131] "The Equal Employment Opportunity Commission Has Made Limited Progress in Eliminating Employment Discrimination," General Accounting Office, Sept. 28, 1976, pp. 60–61.

While these comments related specifically to the offices of Chair and Executive Director, they apply with equal force to precipitous, costly, and counterproductive personnel shifts anywhere within the agency, including the General Counsel's office.

Over the past several years, the Commission has undergone significant internal reforms which have vastly improved its performance abilities and enhanced its credibility with the public at large. These achievements have gained substantial recognition. For example, the Office of Personnel Management recently lauded Commission accomplishments, characterizing the agency's improved productivity as a model for other agencies.[132] The Office of Management and Budget had previously noted that the Commission's internal reforms led to "greatly improved program performance, already apparent in 1979 and continuing strongly in 1980." [133] Finally, in its most recent comprehensive audit of the Commission, the GAO stressed that:

> EEOC has made many significant improvements in its procedures and practices since 1976 that increase its ability to attack employment discrimination.[134]

It noted further that "the great majority of employers—over 75 percent—are satisfied with Commission processes * * * an impressively high figure * * *" [135] It would be nothing short of tragic for these gains of the Commission to be eroded at this time because of a dilution of enforcement efforts, unwarranted and costly personnel changes, and other questionable practices. Thus, the Commission needs immediately to assess these particular problems to determine whether its enforcement program as a whole, as well as its public image, is being undermined and to take any steps necessary to restore and renew its authority and credibility.

Decisive action is particularly critical with respect to ADEA enforcement, since the manner in which the Commission handles that program now may well determine its ADEA enforcement efforts for years to come.

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[132] "Management Initiatives and EEOC's Improved Productivity," an independent study published by the Office of Personnel Management, January 1981.

[133] Management memo, Office of Management and Budget, October 1980.

[134] "Further Improvements Needed in EEOC Enforcement Activities," report of the Comptroller General to the Congress, April 1981, p. 5.

[135] Id., p. 66.

APPENDIX I

SUMMARY OF ADEA PROCEDURES

I. ADEA Case Processing Procedures, N-915, 1/29/81

- A. Process
  - 1. Charge-filing and counseling
    - a. About right to file complaint
    - b. Title VII cp's within pag to be counseled about ADEA too
  - 2. Notice to R and attempted settlement, pursuant to 7(d)
    - a. Settlement attempt only *
      - i. requested relief far in excess of liability and cp indicates no desire to compromise
      - ii. cp's attorney indicates that s/he plans to file private lawsuit
      - iii. information indicates clearly that there is no violation (i.e., 46 year old replaced by 47 year old)
      - iv. amount of potential relief minimal so very limited use of Commission resources called for
    - b. FactFinding -- enhanced 7(d) process
      - i. notice and RFI
      - ii. majority of cases then go into factfinding conference format, but factfinding not scheduled or cancelled if information obtained indicates that case has no merit; cp can offer no rebuttal; or possibility of settlement is remote.
      - iii. focus of factfinding is *settlement* and *gathering enough information to determine whether further investigation is warranted*
      - iv. factfinding outside commuting area to be conducted through conference call or onsite, if travel resources allow and several can be held in one area

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*Charges that are non-jurisdictional will be accepted but no settlement attempt made.

v. timeframes are set in MAPs at completion of 80% of all cases within 150 days.

vi. idea is that conferences will yield high settlement rate. Think it's running at around 23% in age.

c. Continued Investigation

i. limited by resources to about 20% of office's workload

ii. cases involving policy issues; likelihood of substantial relief; large numbers of persons affected; ELI targetted issues or respondents; charges not settled in FF where evidence indicates violation

iii. each office responsible for developing its own respondent list; processing paper provides guidance as to likely areas of violation

iv. issues list:

- denial of employee benefits not justified on cost-to-employer basis
- RIFs
- reorganization
- hiring and promotion discrimination resulting from adverse impact of selection procedures

issues not appropriate for cont. inv. include those where caselaw is adverse; Comm. has not formulated policy; and/or disproportionate number of cases already

v. "every effort should be made to conduct an investigation without visiting the respondent's place of business," but on-sites clearly appropriate and necessary in certain circumstances.

B. Litigation-related

1. Cases to be designated as ELIs as soon as it appears that finding of violation is likely

2. Letter of Violation to be issued if case is deemed litigation-worthy (i.e., either the Commission or private party would sue; but not a determination that the Commission would sue).

3. Letter of Vio. Commission starting point for concilation and tolling, under 7(b) & (e).

4. Commission will generally litigate failure of conciliation cases.

C. Closures do not constitute finding of no violation; just that Commission, for variety of reasons, has determined not to process further.

D. Interim relief, in form of tro or prel. inj. to be sought where

- retaliation
- imminent change in significant aspects of employment status or incidents of employment
- policies where evidence is clear and effects documented, so there is substantial likelihood of success on merits

II. Procedural Regulations, 29 CFR 1626 (published in proposed form, January 30, 1981, 46 FR 9970; memo from MC to SCEP, March 11, 1982, recommending publication in final form with minor changes).

A. General points

1. First procedures ever published under ADEA; DOL's were either unwritten and/or unpublished
2. Attempt to harmonize procedures, where possible and appropriate, with Title VII
3. Substantive provisions mirror Title VII but ADEA procedures are based on FLSA and thus necessary that they differ in some respects from Title VII

B. Provisions:

1. Purpose (1626.1)
2. Terms defined (lifted largely from statute, except additions for complaint, complainant, etc.) (1626.2 and 1626.3)
3. Provides for receipt of information concerning alleged violations, Commission assistance in filing charges, and "on behalf of" charges. (1626.4)
4. Specifies Commission's authority to conduct directed investigations (1626.4).
5. Where to submit complaints and charges. Specifies Commission offices only; i.e., practice of DOL receiving and transmitting complaints to Commission to be officially discontinued. (1626.5)
6. Contents of charge: same as Title VII except no

requirement of verification; this because ADEA contains no such requirement. (1626.6)

7. Timeliness. Major issue is Commission policy of accepting "untimely" charges. But necessary since Comm. has independent investigative authority and since timeliness is statute of limit's, which can be tolled. (1626.7)

   Also, Comm. will continue practice of accepting "oral" charges, since ADEA does not specifically require otherwise. Oral charges are subsequently reduced to writing. (1626.7)

8. Contents and amendments of charges. (1626.8) standard, like Title VII.

9. Referrals to state agencies. Provides for referrals as contemplated by statute; dual filing; Comm. processing without deferral; and worksharing agreements. (1626.9 & .10).

10. Notice required but no specific time period. Contra Title VII, where statutue requires 10 days notice. (1626.11)

11. Section 7(d) conciliation. Points out difference in required procedure under ADEA and Title VII. Notes that investigative authority is discretionary. Adds provision which specifies that cp may file suit after 60 days or upon failure of conciliation, whichever occurs first. Correspnnds to Title VII (but language in Title VII specifies this; no such language in ADEA). (1626.12)

12. Withdrawal. Allows withdrawal but specifies that Commission may continue to investigate because of independent authority. (1626.13)

13. Commission enforcement authority. Outlines the various statutory investigative and other authority conferred upon the Commission and specifies that the Commission may issue formal letters of violation. The section makes clear that the failure to issue such a letter should not be construed to signify that the Commission has found no-violation. Delineates concilation responsibility and discretionary authority of Commission to institute litigation. (1626.15)

14. Subpoenas. Delegates authority to issue subpoenas to General Counsel, District Directors, and various division heads. Unlike the Title VII regulations, these provide no right of appeal

APPENDIX I--Continued

to the Commission as a whole. Since the ADEA does not clearly prescribe such a right of appeal, the Commission has exercised its discretionary authority not to impose this additional procedural step in the enforcement process. The Commission determined not to provide for review because the statute of limitations continues to run under the ADEA until conciliation is commenced or suit is filed; there is no similar problem under Title VII. (1626.16)

15. Opinion Letters. Establishes procedures for requesting the Commission to issue formal opinion letters, which may be relied upon as defenses by the requestor. (In accordance with the Portal to Portal Act section 10 defense). The sections provide that only formal opinion letters (signed by the General Counsel on behalf of the Commission) and matters published in the Federal Register and appropriately designated may be relied upon as section 10 defenses. (1626.17 and 1626.18).

16. Information leading to belief that other statutes violated. Provides that whenever investigation is being conducted under one statute or charge is filed under one statute, and Commission uncovers information from which it may infer a violation of another statute it administers, it will proceed appropriately under that statute as well. (1626.19)

APPENDIX I--Continued

III. ADEA Compliance Manual -- sections 201 - 284 (approved Nov., 1981)

- A. Section 201 - Intake
  - 1. Extensive instructions for counselling of charging parties/complainants
  - 2. Detail as to documentation required of charge
  - 3. Intake processing procedures
- B. Section 204 - Closure prior to finding of violation; Dismissal of concurrent ADEA/Title VII charges
  - 1. Bases for closure (e.g., no jurisdiction; situation is "no-violation," e.g., apprenticeship age limits; case not within two-year period; charging party files suit; settlement attempts fail; etc.)
- C. Section 206 - Notice of Right to Sue in Concurrent ADEA/Title VII cases
- D. Section 207 - Withdrawal
  - 1. Procedure depends on timing of request (e.g., before or after notice to respondent)
  - 2. Withdrawal of ADEA charge does not affect Commission authority to continue investigation
- E. Section 210 - Notification to Respondent
  - 1. Rule generally to provide respondent with copy of charge unless there is reason merely to provide notice
- F. Section 212 - ADEA Early Litigation Identification (ELI)
  - 1. Criteria
    - * Strength and impact of case
    - * Issues involved
    - * Special circumstances, e.g., recurring violations or retaliation
    - * ADEA respondent list
  - 2. Timing of selection -- focus is on early selection, but identification may be made at any stage of process
  - 3. Coordination of compliance and legal units
  - 4. Guidance list provided, but each office expected to supplement based on individual office's experiences
- G. Section 213 - Requests for Litigation involving Temporary and Preliminary Relief
  - 1. Strict time frames on investigation, attempted

APPENDIX I--Continued

conciliation, and recommendation for suit

2. Procedure: Presentation Memorandum recommending suit with request for preliminary relief submitted to Commission; if not disapproved within 24 hours, complaint will be filed

3. Intake to screen all charges to determine whether preliminary relief is appropriate or necessary

4. Routinely sought in retaliation cases

H. Section 214 - ADEA Settlement and Factfinding

I. Section 215 - Settlements before Issuance of Letter of Violation

1. Considered negotiated settlements, agreements entered pursuant to section 7(d) requirements

J. Section 222 - ADEA Unit Investigation Procedures

1. Procedures for selection

2. Leads

3. Scope, including limitations; period of investigation.

4. Coordination, where necessary, with legal unit

K. Section 223 - Interviews

L. Section 224 - Investigatory Powers - Administrative Subpoenas and Warrant for Inspection

1. Office to attempt to obtain necessary information without resort to subpoena process

2. Regional Attorney responsible for enforcement of subpoena

M. Section 225 - On-site Investigation

1. Factors to be considered in determining necessity/propriety of on-site

N. Section 226 - Selection and Analysis of Records

O. Section 227 - Investigator's Report

P. Section 240 - Review for Litigation Worthiness and Issuance of Letter of Violation

1. Establishes litigation worthiness standard for issuance of formal letter of violation

2. LOV establishes date on which conciliation begins

Q. Section 260 - Disposition of ADEA Cases After Issuance

APPENDIX I--Continued

of Letter of Violation

1. Concilation

2. Remedies sought

3. Options available to Commission and private parties if conciliation fails

R. Section 261 - Supervision of Payment of ADEA Damages

1. Distribution by respondent, general rule

2. May be by EEOC

S. Section 263 - Concilation Agreements Permitted without Charging Party Approval and Signature

1. Reserving rights of charging parties

2. Charging Party declines full relief

3. No violation with respect to cp; violations with respect to other aggrieved individuals

T. Section 266 - Unsuccessful Conciliation Efforts

1. Discretionary notification of failure of conciliation to respondent

2. Charging parties to be apprised of status of conciliation, especially if statute of limitations about to lapse

U. Section 267 - ADEA Case Documentation Requirements

V. Section 284 - Referral of Cases to Department of Justice

1. Applicable only to concurrent Title VII/ADEA cases, since Commission does not have authority to sue state and local governmental entities under Title VII; Title VII aspect referred, Commission retains ADEA

IV. Various Field Notes, to provide guidance in processing charges

A. Number 904-33, 3/31/81: deals with reporting of ADEA charges, including specifically those filed simultaneously with state agencies.

B. Number 904-35, 5/29/81: extensive field note on employee benefits plans, including glossary of terms; summary of applicable interpretations; and questions and answers.

C. Number 904-36, 6/30/81: deals with ADEA in federal sector.

D. Number 904-38, 8/25/81: deals with ADEA intake.

APPENDIX II

FISCAL YEAR 1982 MANAGEMENT PLAN, PERFORMANCE INDICATORS, PROCESSING ASSUMPTIONS, EXPECTED LEVELS OF ACHIEVEMENT

ADEA		TITLE VII		EPA	
Performance Indicator	ELA*	Performance Indicator	ELA*	Performance Indicator	ELA*
% closures with benefits (mon. & non-mon)	25%	Factfinding % closures or transfers settlement or withdrawals with benefits	45%	% closures with benefits (mon. & non-mon.)	20%
Ave. mon. benefits per charge settled	7500	Ave. mon. benefit per charge settled	3000	Ave. mon. benefit per charge settled	6500
% charges in Unit over 180 days	35%	% charges in unit over 120 days	20%	% charges in Unit over 150 days	20%
Average processing time of charges closed in unit	150 days	Ave. processing time	110 days	# ELI cases referred to Legal Unit	**
# ELI cases referred to Legal Unit	**				
Processing Assumptions	90 charge resolutions/ EOS/year	Processing Assumptions	90 charge resolutions/ EOS/year***	Processing Assumptions	40 charge resolutions/ EOS/year
		CIC-ELI # ELI cases referred to Legal Unit	**		
		Ave. mon. benefit per charge settled	9000		
		Processing Assumptions	5 litigation referrals/ EOS/year		
		CIC-Other % closures with monetary benefits	20%		
		% charges in unit over 180 days	35%		
		Average processing time of charges closed in unit	150 days		
		Processing Assumptions	70 charge resolutions/ EOS/year		

Note: Title VII is broken out for three functions: factfinding; continued investigation - early litigation identification; and continued investigation - other.

* Expected level of achievement.
** Negotiated by each office.
*** Processing Assumption for area offices is 85 charge resolutions per EOS per year.

Performance Indicator: program unit indicators for which annual and quarterly goals are set.

Expected Level of Achievement: performance levels established for selected performance indicators which provide guidance for anticipated achievement based on prior experience

Processing Assumptions: guidance derived to assist offices in allocating staff to workload. Not to be used as production standard.

APPENDIX III

CHARGES, SETTLEMENTS, AND CLOSURES, 1979-82

	Title VII			ADEA				EPA			Fiscal year 1981	
	Fiscal year 1979	Fiscal year 1980	Fiscal year 1981	Fiscal year 1979	Fiscal year 1980	Fiscal year 1981	Fiscal year 1982*	Fiscal year 1979	Fiscal year 1980	Fiscal year 1981	ADEA/ Title VII	EPA/ Title VII
Total charge receipts------	66,569	79,868	78,441	--	11,076**	10,469	4,610	--	2,870**	673	2,241	1,393
EEOC--------	35,279	45,382	44,992	5,374	8,779	8,101	--	--	2,303	--	1,378	1,084
State/local-	31,290	33,486	33,449			2,368					863	309
Total settlements***------	17,823	27,232	30,879	--	1,270	1,787	--	--	--	513		
EEOC--------	10,143	16,088										
State/local-	7,680	11,144										
Total closures-	71,275	31,616****	44,348	5,168	6,488	7,864	--	--	1,614	2,041		
Benefits ($000)	$23,817	$43,082	$60,589	$11,263	$12,312	$28,031	--	--	$1,926	$3,091		
Directed investigations initiated*****-				663	200	84	121	--	390	408		

* First 6 months of fiscal year 1982 (ADEA only).

** The fiscal year 1980 data for ADEA and EPA were not broken out separately by EEOC and State/local receipts.

*** Total settlements were reported differently in fiscal years 1980 and 1981; this report relies on the fiscal year 1980 format.

**** The title VII closures do not include backlog closures.

***** ADEA and EPA only.

-- Indicates that figures were not reported or were not readily translatable for this chart.

APPENDIX IV

BUDGET AND STAFFING

1) Positions

Enforcement Function	1979	1980	1981	1982
Intake 1/	317	384	355	359
Title VII Charge Processing	1212	1247	1208	1134
ADEA Charge/Complaint Processing	108	122	128	131
EPA Complaint Processing	92	98	99	96
Legal Enforcement 1/	457	453	416	403

1/ The Intake and Legal function include Title VII, ADEA, and EPA.

2) Dollars

The Equal Employment Opportunity Commission (EEOC) does not allocate its budget resources, other than positions, between the various enforcement functions. The agency is heavily staff intensive, therefore, its budget consists mainly of funds for personnel compensation and benefits and support costs such as space, telephone, rental of equipment, etc. In FY 81 of the agency's total budget of $140 million, $18 million was allocated to the State and Local program which includes both Title VII and ADEA. Of the remaining $122 million 78%, or over $95 million, was allocated for personnel compensation and benefits with the remainder allocated for support costs and travel.

For FY 82 the agency's positions and attendant dollars for personnel compensation and support, etc. are allocated by enforcement program as follows:

	Positions	Dollars
Title VII	73%	$86,060,000
ADEA	12%	$14,640,000
EPA	7%	$ 8,540,000
Federal Sector	8%	$ 9,760,000
State and Local	-	$18,000,000

3) Proposed Cut Backs

Any reduction to the agency's FY 82 Budget will be allocated proportionately among the various enforcement programs.

APPENDIX V

ADEA, EPA, SYSTEMIC STAFFING COMPARED; OFFICE RANK WITH RESPECT TO ADEA INTAKE; ALL INTAKE

Office	Systemic	ADEA	EPA	Office's rank with respect to	
				ADEA	All
Atlanta	6	4*	4	13	8
Baltimore	6	8*	3	5	3
Birmingham	5	4*	3	12	4
Charlotte	5	← 8* →		9	11
Greensboro A.O.		1			
Chicago	4	7	4	8	5
Cleveland	5	5*	4	4	9
Dallas	8	5*	3	6	2
El Paso A.O.		1			
Denver	5	2*	2	16	20
Detroit	8	← 6* →		19	21
Houston	4	3*	3	14	1
San Antonio A.O.		1			
Indianapolis	5	← 6* →		7	17
Los Angeles	5	6	5	15	15
Memphis	5	← 9* →		11	6
Miami	4	5	4	17	14
Milwaukee	5	← 7* →		2**	18
New Orleans	5	3*	5	20	7
New York	7	5	4	1	12
Boston		← 7* →			
Philadelphia	5	5	6	3	10
Pittsburgh		← 4* →			
Phoenix	5	← 4* →		18	19
St. Louis	5	4*	2	10	13
Kansas City		4*	2		
San Francisco	4	7	4	21	16
Seattle	5	← 5* →		22	22

* ADEA and EPA share one supervisor; ← → combined unit.

** Unexplained unusually high ADEA intake in Milwaukee.

APPENDIX VI

COMPARISON OF INTAKE IN EEOC WITH AND WITHOUT AGE UNITS

With Age Units		Without Age Units	
Office	Charges	Office	Charges
		Fresno	9
		Washington	11
		San Jose	26
		San Diego	44
El Paso(1)*	54		
		Little Rock	55
		Oakland	59
		Norfolk	67
Greensboro (1)*	74		
		Jackson	76
		Albuquerque	90
New Orleans	109		
		Greenville, S.C.	112
San Antonio (1)*	114	Dayton	114
		Newark	117
		Oklahoma City	120
		Louisville	121
		Tampa	122
		Richmond	128
		Buffalo	130
Kansas City	137	Raleigh	137
Boston	143		
		Nashville	147
		Cincinnati	151
Atlanta	163		
Charlotte	177		
Los Angeles	183		
St. Louis	221		
Houston	224		
Birmingham	232		
Baltimore	244		
Phoenix	298		
Dallas	318		
Pittsburgh	326		
Denver	329		
		Minneapolis	342
San Francisco	355		
Detroit	367		
Cleveland	378		
Seattle	390		
Chicago	431		
Indianapolis	437		
Philadelphia	458		
Milwaukee	739		

* Office has 1 EOS designated to process age charges.

Note: The Miami D.O. is excluded from this chart since its intake was not reported in the base document. Memphis and New York District Offices have been excluded because, although intake was reported for each, it was obviously wrong (Memphis - 6; New York - 12).

APPENDIX VII

ADEA CHARGES BY DISTRICT OFFICE; STAFFING BY DISTRICT OFFICE; RATIO STAFFING TO INTAKE

Ranking acc. to ADEA Intake	ADEA Charges	Comp. Staff (Exh. 4)	Comp. Staff (Exh. 9)	Ratio Charges to Staff
New York	807	5	5	38[1]
Boston		(7*)	(7*)	
Milwaukee	790[2]	(7*)	5	158
Philadelphia	616	5	5	88[3]
Pittsburgh		(4*)		
Cleveland	586	6*	8	94
Baltimore	490	8*	8	54
Dallas	437	6*	5	73[4]
El Paso		1		
Indianapolis	415	(6*)	(6*)	69/104[5]
Chicago	392	7	7	56
Charlotte	389	(8*)	(8*)	47/97[6]
Greensboro		1		
St. Louis	384	4*	3	55[7]
Kansas City		4*		
Memphis	337	(9*)	(9*)	56/84[8]
Birmingham	310	5*	5	62
Atlanta	307	5*	5	61
Houston	281	4*	4	56[9]
San Antonio		1		
Los Angeles	240	6	6	40
Denver	240	3*	3	80
Miami	202	5	6	34
Phoenix	193	(4*)	(5*)	64/97[10]
Detroit	190	(6*)	(6*)	48/63[11]
New Orleans	183	4*	4	46
San Francisco	160	7	7	23
Seattle	152	(5*)	3	51

Footnotes on next page.

Ratio charges to staff was calculated by dividing number of charges by compliance staff, exhibit 9 figure. This figure was used because the exhibit contained an explicit breakdown by name of compliance staff devoted to ADEA processing. The assumption was that this figure might be more accurate than that in exhibit 4. Note that this ratio is based on charge intake; it does not reflect actual caseload per EOS. It also treats supervisors equally with EOS's, which was necessary since there is no information currently available to the Committee which reflects the nature or of caseload absorbed by a supervisor. While the ratio in this chart does not indicate actual caseload per EOS, it presumably indicates the relative balance of staff resources devoted to ADEA among various offices.

* Indicates that the ADEA and EPA units share a supervisor; s/he has been included in this ADEA calculation.

( ) Indicates that ADEA and EPA units are combined; thus, it is not generally possible to determined precisely the number of EOS's devoted to ADEA enforcement. Note, however, that with respect to Milwaukee and Seattle, Exhibit 9 did specify ADEA enforcement positions, broken out separately.

1. This figure assumes that 4 persons in Boston are devoted to ADEA enforcement.

2. Milwaukee has an unexpectedly high ADEA charge intake.

3. This figure assumes that 2 persons in Pittsburgh are devoted to ADEA enforcement.

4. This figure includes the 1 EOS in El Paso.

5. This range reflects the ratio of 4 EOS's to 6 EOS's.

6. This range reflects the ratio of 4 EOS's to 8 EOS's. Note that if the 1 EOS from Greensboro is added in, then devotion of 5 EOS's to ADEA enforcement would result in a ratio of 77.

7. This figure includes all four persons from Kansas City.

8. This range reflects the ratio of 4 EOS's to 6 EOS's.

9. This figure includes the 1 EOS from San Antonio.

10. This range reflects the ratio of 2 EOS's to 3 EOS's.

11. This range reflects the ratio of 3 EOS's to 4 EOS's.

APPENDIX VIII

EEOC APPELLATE LAWSUITS

Case Style	Ct.	Action Below	Action on Appeal	Con.	Hir.	RETIREMENT			Trf/Dem.	Proc.	Retro of Amds.	Dam.	Other
						Pol. BFOQ	"BP" Plan	Invol					
EEOC v. ALPA	8	F	Rev.										x(req. that age-60 pilots use vac. time rather than receive lump sum pay)
EEOC v. County of Allegheny & Comm. of Pa.	3	F		x	x[1]								
EEOC v. City Council of Baltimore	4	F		x		x							
EEOC v. Brown & Root	5	U											x (whether EEOC has right to jury trial)
EEOC v. County of Calumet	7	F		x									x (may CBA waive ind. rts
EEOC v. Eastern Airlines	5	F	Aff.				x						
EEOC v. Elrod Hardiman	7	F	Aff.	x									x (Subpoena enforcement)
Farmers Group Inc. v. Marshall (now, EEOC)	D.C. Cir.	F	Aff.										x (ripeness fo jud. review of contemplated agency regs)
EEOC v. First Catholic Slovak Ladies Ass'n	6	U											x (whether officers of corp. are employees)
EEOC v. Frontier Airline	10	U	Aff.		x[2]					x[3]			x (was there a conciliation agreement barring suit?)
EEOC v. Home Ins. Inc.	2	U	Rev.				x						
Houghton & EEOC v. McDonnell Douglas	8	U	Rev. in part Aff. in part			x							
EEOC v. City of Janesville	7	F	Rev.			x[4]							
EEOC v. County of Los Angeles	9	F	<	x	x								
Murnane & EEOC v. American Airlines	D.C. Cir.	U	Aff.		x								
EEOC v. Pan American Airways	2	U	Rev.							x[5]			
EEOC v. Phillips Petro.	10	U								x[6]			
EEOC v. City of St. Paul	8	F	Aff.			x							
EEOC v. County of Santa Barbara	9	U	Rev.			x	x						x (advertisin expressing youth pref.)
EEOC v. Univ. of Texas at El Paso	5	F	Aff.							x[7]			
EEOC v. Western Electric	4	F						x	x				
EEOC v. State of Wyoming	S.Ct.	U		x									

U = unfavorable ruling; F = favorable ruling.

[1] Unless otherwise specified, all hiring cases involve a policy pursuant to which no one over a certain age may be hired; defendants raise a bfoq defense.

[2] Involved the refusal to hire named charging party; district court found him not qualified.

[3] Procedural question as to willfulness and appropriate statute of limitations.

[4] Reversed grant of preliminary injunction.

[5] Procedural question as to whether stipulation of dismissal could be amended to specify that private right of action not foreclosed by dismissal. Cir. ct. permitted amendment.

[6] Procedural question as to adequacy of Commission proof (i.e., statistics and evidence of overt acts) to establish *prima facie* case.

[7] Procedural question as to whether Commission must move to certify class action, pursuant to Fed.R.Civ.Proc. 23, under the ADEA; Cir. Ct. says no.

APPENDIX IX

EEOC AMICUS PARTICIPATION

Case Style	Ct.	Action Below	Action on Appeal	Con.	Hir.	RETIREMENT Pol. BFOQ	"BP" Plan	Invol.	Trfr/ Dem.	Proc	Retr. of Amds.	Dam.	Other
Aldendifer v. Continental Airlines	9	U	Aff.				x		x[1]		x		
Ciccone v. Textron, Inc.	1		Fav.							x[2]			
Coke v. General Adjust-Board	5		Fav.							x[3]			
Crossland v. Charlotte Eye, Ear & Throat	4												x[4]
Davis v. Calgon Corp.	3		Fav.							x[5]			
Derris v. City of Kenosha (decided on Const. grounds, but ADEA claim plead)	E.D. Wisc.		Fav.				x						
Fairleigh Dickinson Univ. v. AAUP Friel	DNJ	U											x[6]
Friel v. TransAmerica Airlines	5				x[7]					x[8]			
Goodman v. Heublein	2	F	Aff.							x[9]		x[10]	
Jensen v. Gulf Oil Refin. & Mktg	5		U.								x		
Mayer v. Edler-Beerman Stores Corp.	6	U	Aff.										x[11]
Northwest Airlines, Inc. v. Neuman	D. Minn		Fav.							x[12]			
Sexton v. Beatrice Foods Co.	7	U	Rev.				x						
Smallwood v. United Airlines	4	U	Rev.		x					x[13]			
Steisbarger v. Rockwell Corp.	ED Wash.									x[14]			
Tuohy v. Ford Motor Co.	6	U	Rev.			x							
Wehr v. Burroughs	3	F	Aff.									x	
Wright v. Tennessee	6		Fav.							x[15]			

Footnotes on next page.

1. Issue was whether refusal of airline to allow pilots approaching age-60 to "downbid" violated ADEA.

2. Question as to timeliness of charge-filing: is charge filed with state agency and EEOC within 300 days timely?

3. Question as to whether time period for filing charges (180 days) is jurisdictional, or statute of limitations subject to equitable tolling. Courts now hold that it is the latter. Acc. Zipes v. Transworld Airline, U.S.L.W. (1982), in which the Supreme Court held that a similar requirement under Title VII is subject to tolling.

4. Issue of whether failure to apply pension credit for plaintiff's work between 1968 and 1976 because of her age violated ADEA.

5. See n.2 above.

6. Question of whether University may seek declaratory judgment with respect to its compliance with ADEA. Court upheld University's motion because individual professor had already filed separate action on the merits (on which he ultimately prevailed).

7. Issue was refusal to rehire, while rehiring younger employees.

8. See n.2 above.

9. Two procedural issues: whether second notice of intent to sue is necessary where plaintiff alleges retaliation; whether jury charge was adequate and fair. Court ruled in plaintiff's favor on both points.

10. Applicability of FLSA "good faith" defense to prayer for liquidated damages under ADEA; court held defense inapplicable.

11. Issue of whether ADEA is violated if age is "any" factor, or whether it must be a "determining" factor; court said it must be a determining factor. This is consistent with caselaw.

12. Whether ADEA creates right for employer to sue for declaratory judgment as to its compliance. Court dismisses.

13. See n.3 above.

14. See n.2 above.

15. See n.3 above.

APPENDIX X

COMPARISON CHARGES TO LAWSUITS

	CHARGES/ALLEGATIONS*				LAWSUITS **	
	FY 1980[1]	FY 1981[2]	TOTAL	% OF ALL	NUMBER	% of All
HIRING	1679	1207	2886	16%	34	19%
DISCHARGE/LAYOFF[3]	6460	4330	10,790	60%	64	60%
RECALL[4]	205		205	1%		
WAGES	748	102	850	5%		
PROMOTION[5]	966	672	1638	9%	11	10%
DEMOTION[6]	611	441	1052	6%	5	5%
SENIORITY	172		172	1%		
JOB CLASS.	144		144	1%		
TRAINING/APPRENT.	91	110	201	1%		
EXCLUSION	30		30	-		
REP. BY UNION	148		148	1%	3	3%
SEG. LOCALS						
REFERRAL	40		40	-		
QUAL./TESTING	51		51	-		
ADVERTISING	2		2	-	4	4%
BENEFITS	487	345	832	5%	7	6%
SEG. FACILITIES	2		2	-		
INTIM./REPRISAL	287		287	2%	4	4%
TERMS & COND'NS	1035	910	1945	11%		
TENURE	15		15	-		
UNSPECIFIED	1083		1083	6%		
OTHER		2703	2703	15%	16[7]	15%
ALL	14,256	10,820	17,878	100%+[8]	(148)[9]	100%+

Footnotes on next page.

* The numbers in these columns exceed substantially the actual number of ADEA charge receipts in either fiscal year. The assumption is that these numbers reflect allegations and that since any charge may contain several allegations (i.e., failure to promote, terms and conditions, discharge), it may be counted more than once. Alternatively, the exhibits relied upon may reflect combined federal-state intake or combined ADEA and ADEA/Title VII intake.

** The EEOC submitted copies of 108 complaints filed in federal district courts to the committee. These complaints were reviewed for purposes of developing this chart. This column reflects allegations in complaints; thus, lawsuits may be counted more than once.

1 Taken from EXHIBIT # 1, Letter from Edgar Morgan to Michael Batten, Oct. 30, 1981.

2 Taken from "Volume A - Male" and "Volume B - Female", Letter from Edgar Morgan to Michael Batten, Jan. 14, 1982.

3 FY 80 data was broken down into categories of "discharge," "layoff," and "recall." FY 81 data only contains "discharge" category. Thus, discharge and layoff have been consolidated in this chart.

4 FY 81 deletes "recall" category.

5 Promotion includes refusal to transfer.

6 Demotion includes involuntary transfer.

7 Includes 4 suits involving severance pay; 6 alleging that collective bargaining agreements violate the ADEA and/or that unions have attempted to force employers into violating the Act; 5 alleging violations of recordkeeping and reporting requirements; and 1 "other."

8 Exceeds 100% because of double-counting.

9 Exceeds 108 because of double-counting.

(u) Several lawsuits included allegations that employers had classified or segregated employees in a manner that affected wages; however, they have not been counted here since it was not clear from the complaints the precise manner in which the wage claim was being raised.

(m) Many of the complaints included a general allegation that employers had "segregated" or "classified" employees in violation of the Act. Since this language tracks the substantive section of the Act, it was not clear whether a specific classification system was being challenged or whether this merely constituted a routine allegation of violation.

APPENDIX XI - a

COMPARISON OF NUMBER OF ADEA CHARGES PER OFFICE TO NUMBER OF ADEA LAWSUITS PER OFFICE

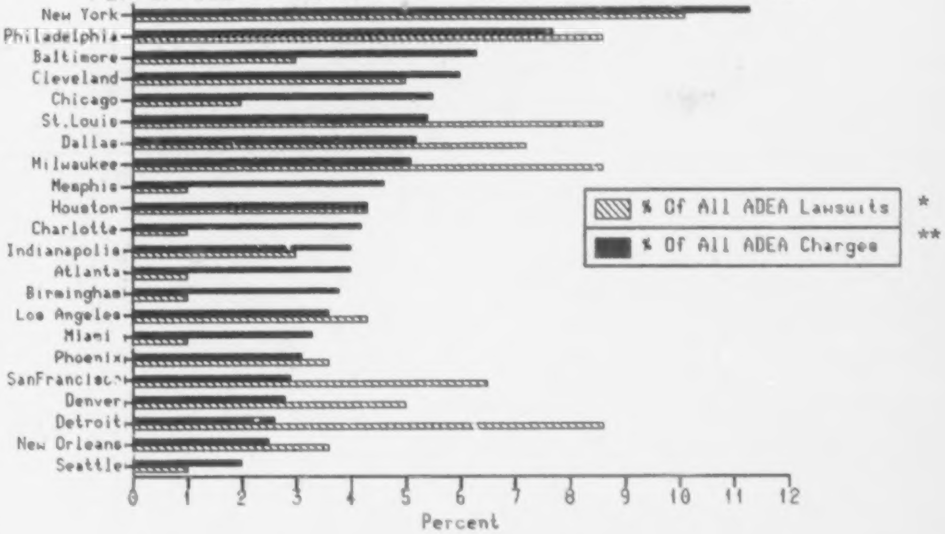
OFFICE	CHARGES*		LAWSUITS**	
	NUMBER	PERCENT	NUMBER	PERCENT
Atlanta	686	4	1	1(-)
Baltimore	1100	6.3	4	3
Birmingham	677	3.8	2	1(+)
Charlotte	739	4.2	2	1(+)
Chicago	968	5.5	3	2
Cleveland	1053	6	7	5
Dallas	908	5.2	10	7.2
Denver	489	2.8	7	5
Detroit	458	2.6	12	8.6
Houston	763	4.3	6	4.3
Indianapolis	707	4.0	4	3
Los Angeles	630	3.6	6	4.3
Memphis	814	4.6	2	1(+)
Miami	585	3.3	2	1(+)
Milwaukee	889	5.1	12	8.6
New Orleans	432	2.5	5	3.6
New York	1984	11.3	14	10.1
Philadelphia	1352	7.7	12	8.6
Phoenix	549	3.1	5	3.6
St. Louis	949	5.4	12	8.6
San Francisco	518	2.9	9	6.5
Seattle	344	2.0	2	1(+)
TOTAL	17,594		139	

* Includes charges for fiscal years 1980 and 1981.

** Includes lawsuits filed in fiscal years 1980, 1981; fiscal year 1982 included since lawsuits filed in that year may have resulted from fiscal year 1981 charges. Lawsuits per office for fiscal years 1980-81 based on oral interviews.

APPENDIX XI - b

COMPARISON OF PERCENT OF ADEA CHARGES PER OFFICE TO PERCENT OF ADEA LAWSUITS PER OFFICE



* Includes charges for fiscal years 1980 and 1981.
** Includes lawsuits files in fiscal years 1980, 1981, and 1982; fiscal year 1982 included since lawsuits files in that year may have resulted from fiscal year 1981 charges. Lawsuits per office for fiscal years 1980-82 based on oral interviews.

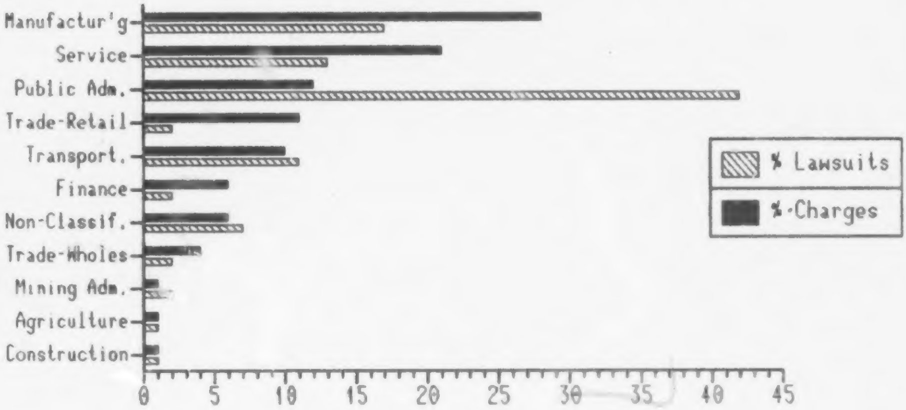
APPENDIX XII

BREAKDOWN BY DISTRICT OFFICE OF SUITS AGAINST PRIVATE AND PUBLIC EMPLOYERS AND NAMING UNIONS

District Office	Priv. Emp. Suits	Pub. Emp. Suits	Unions
Atlanta			
Baltimore	2	2	
Birmingham	1		
Charlotte	2		
Chicago	2		
Cleveland	4	1	
Dallas	4	3	
Denver	1	4	
Detroit	3	6	[1]
Houston	3	1	
Inidianapolis	2		
Los Angeles	5	2	
Memphis	1	1	
Miami	1		
Milwaukee	3	8	[1]
New Orleans	1	3	
New York	12	3	[1]
Philadelphia	2	2	
Phoenix	4		
San Francisco	4	4	
Seattle	1	1	
St. Louis	6	3	
Total	62 (57%)	46 (43%)	[3]

APPENDIX XIII

COMPARISON OF CHARGES AND LAWSUITS BY INDUSTRY



APPENDIX XIV

EEOC POLICY INITIATIVES UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

FINAL INTERPRETATIONS, AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 CFR Part 1625

Date of Publication: September 29, 1981, 46 FR 47724.

Summary: The final regulations provide as follows:

Section 1625.1 Definitions

Section 1625.2 Discrimination between individuals protected by the Act. Makes clear that it is unlawful to discriminate within the protected age group, but specifies that in some circumstances the provision of additional benefits to older workers within the protected age group may be lawful if the purpose of such special benefit is to counteract problems related to age discrimination.

Section 1625.3 Employment Agency. Clarifies coverage of employment agencies.

Section 1625.4 Help wanted notices or advertisements. Clarifies that advertisements expressing age preference, either directly (i.e., under 30) or indirectly (i.e., "recent grad"), violate the Act unless an exception applies; and that EEOC will closely scrutinize any request by an employer that applicant "state his/her age" to assure that the purpose of such request is not to violate the ADEA.

Section 1625.5 Employment Applications. Defines employment applications as written inquiries, including resumes, and specifies that requirement that applicant state age will be closely scrutinized.

Section 1625.6 Bona fide occupational qualifications. Establishes very strict rule with respect to meeting bfoq defense. Respondent must show that age-limit is reasonably necessary to essence of business, that all or substantially all of the persons within the age group would be unable to perform the duties in question or that some members of the group possess a disabling characteristic which could not be detected through individual testing. The defense will be available in limited circumstances, with the burden on the employer to prove its applicability. Also clarifies that state laws setting maximum and minimum age limits are superceded unless justified as bfoq.

Section 1625.7 Differentiations based on reasonable factors other than age. Specifies that the defense is available only whether age itself is not explicitly used as a limiting criterion and that determination as to applicability of defense will be made on case-by-case basis. Also requires that where tests or other *selection devices* have *adverse impact* based on age, they will be scrutinized under the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607. Finally, clarifies that cost is not a reasonable factor other than age unless cost considerations arise in the context of an employer's observance of a bona fide employee benefit plan authorized by section 4(f)(2) of the ADEA.

Section 1625.8 Bona fide seniority systems. Specifies that length of service must be the main criterion of a bona fide seniority system; that employees must be provided with effective notice of the terms and conditions of a seniority system in order that it be considered bona fide; and that systems which are not bona fide under Title VII of the Civil Rights Act will be closely scrutinized to determine whether they violate the ADEA as well.

Section 1625.9 Prohibition of involuntary retirement. Updates existing DOL interpretations to include 1978 Amendments' prohibition against involuntary retirement. Specifies that amendment applies retroactively to all cases pending at time of enactment and prescribes manner in which collective bargaining agreements will be analyzed to determine their eligibility for one-year statutory extension.

Section 1625.10 Reserved for costs and benefits under employee benefit plans. See infra.

Section 1625.13 Apprenticeship programs. Affirms previous DOL position to effect that bona fide apprenticeship programs are exempt from coverage under the Act.

APPENDIX XIV--Continued

Chronology

June 13, 1979: Meeting and discussion by Staff Committee on Employment Policy (SCEP) (policy-development arm of the Commission) to consider proposed revisions to DOL Interpretative Bulletin.

June 2[illegible], 1979: Commission publishes notice in Federal Register to effect that existing DOL interpretations will remain binding until Commission has completed its review and taken final action.

July 2, 1979: Commission adopts and publishes in final form existing DOL recordkeeping and notice regulations. 29 CFR 1627 (44 FR 38459)

October 19, 1979: Proposed ADEA interpretative regulations submitted to SCEP for review and consideration.

November 21, 1979: Commission publishes in final form proposed DOL interpretations on "tenured faculty" and "executive and high policymaking employees" ' exemptions from coverage. (Adopted as proposed, with certain changes made by DOL). 29 CFR 1627 (44 FR 66791)

November 30, 1979: Commission publishes Proposed Interpretations under the ADEA, 44 FR 68858. Significant changes from existing DOL interpretations included: (1) deletion of most examples of bfoq's and rfoa's (reasonable factors other than age); (2) elimination of language regarding *bona fide* seniority systems which perpetuate the effects of past age-based discrimination; (3) inclusion of a section prohibiting involuntary retirement; and (4) elimination of the then-existing DOL interpretation exempting bona fide apprenticeship programs from coverage. Sections on bona fide employee benefits plans were explicitly excluded for future review and consideration.

December 17, 1980: SCEP considers Office of Legal Counsel analysis of comments on proposed interpretations.

January 21, 1981: Memorandum circulated to members of SCEP relative to section 1625.2(b) of the proposed interpretations.

July 28, 1981: Commission approves final interpretations.

September 29, 1981: Final interpretations published in Federal Register, 29 CFR 1625, 46 FR 47724. Significant change from proposed interpretations was inclusion of the DOL position exempting bona fide apprenticeship programs from coverage.

APPENDIX XIV--Continued

PENSION ACCRUAL AFTER NORMAL RETIREMENT AGE AND RELATED ISSUES

Date of Publication: (pending)

Summary: Over the course of the past two-and-a-half years, the Commission has undertaken a comprehensive review and reconsideration of the Department of Labor's IB on employee benefits plans. Specifically, the Commission was concerned with DOL Amendments published May 25, 1979, 44 FR 30648 which provided, inter alia, that: (a) an employee hired within five years of normal retirement age may be excluded from participation in a defined benefit plan; "a defined contribution plan may provide for the cessation of employer contributions after the normal retirement age of any participant in the plan;" under a defined benefit plan, an employee need not be credited with years of service worked after normal retirement age; defined benefit plans need not make actuarial adjustments of benefits accrued by normal retirement age for an employee working beyond nra; "a defined benefit plan need not provide for the accrual of benefits for an employee who continues to work after normal retirement age;" and a defined benefit plan may fail to take into account salary increases and benefit improvements incurred after normal retirement age.

As the chronology below reflects, the Commission at one point contemplated substantial revisions to these interpretations; the Commission recognized that these interpretations were not without some support in the legislative history of the 1978 amendments but believed that the 1967 legislative history (which was controlling) was directly contrary to these interpretations. In addition, the Commission believed that the existing interpretations resulted in a windfall to employers, at the direct expense of older workers.

For a variety of reasons, however, the Commission never published revisions to these interpretations in either proposed or final form. Recently, the new General Counsel has proposed that the Commission formally adopt the DOL position, on the basis that the existing interpretations comport with governing legislative history and that "business community support for the 1978 extension of coverage of the act from age 65 to 70 was apparently based in large part on assurances from Congress that such an extension would not increase pension costs." (Memo from Michael Connolly, General Counsel, to SCEP, March 25, 1982, p.4.) Moreover, Mr. Connolly points out that "the absence of final agency action regarding the "IB" has resulted in considerable confusion among both employers and employees." Ibid. In particular, he notes that the Commission has twice been sued with respect to these regulations while under reconsideration. While the Commission successfully defended against the first suit on the grounds of ripeness for judicial review, the D.C. District Court admonished that "delay past some point undercuts the force of an agency's assertion that meaningful reconsideration is taking place." Id., at 5.

APPENDIX XIV--Continued

Chronology:

August 6, 1979: Memo from Issie L.Jenkins, Acting General Counsel, to Fred Dorsey, Director, Office of Policy Implementation, re: accrual of pension benefits after normal retirement age. Memo recommends that Commission consider an amendment to DOL IB on basis that interpretation works a hardship on older employees, while creating a windfall for employers.

August 30, 1979: Memo from Leroy D. Clark, General Counsel, to Commissioners, re: accrual. Memo expresses General Counsel's conclusion (with supporting rationale) that DOL IB on accrual is incorrect and that the Commission should amend the Bulletin. Recommends that final rule should be consistent with notion that employer may make actuarially significant costs-reductions, so long as the actual cost incurred on behalf of the older worker equals that incurred on behalf of the younger.

October   , 1979: Memo from Constance L. Dupre, Associate General Counsel to SCEP discussing possible alternative proposals when considering changes to DOL Bulletin with respect to accrual. The proposals were designed to deal with the following problems in the IB: (1) that an employer was authorized to"stop crediting for the purposes of accrual all service beyond age 65;"(2) that s/he could"refuse to make actuarial adjustments in retirement benefits for employees who continued to work beyond age 65;"and that (3) s/he could refuse"to take into account salary increases and benefit improvements under the plan which occur after normal retirement age."

November 30, 1979: Commission publishes proposed final interpretations, with section on employee benefits explicitly excluded for further consideration.

March 27, 1980: Memo from Leroy Clark and Charlotte Frank, Director, Office of Field Services, to SCEP containing specific proposed interpretation and discussion of comments received from DOL and IRS after informal circulation for review. The proposal would have (1) required "crediting years of service in a defined benefit plan which occur after normal retirement age;" (2) "require that contributions /to a defined contribution plan/ continue for" employees whose contributions at normal retirement age are inadequate to meet benefit goals or for participants in plans with no benefits goals, and (3) prohibit outright exclusion of employees hired within five years of normal retirement age from participation in a defined benefit plan, (4) provided alternatives to the IB's provisions negating the requirement of actuarial adjustment of benefits and excusing the failure to take into

APPENDIX XIV--Continued

increased salary or improved benefits occurring after normal retirement age; and (5) included a modification to the IB "that would permit the application of the 'benefit package' approach to pension and retirement plans " (previously expressly prohibited by DOL. Memo also recommended that modified version be circulated to federal agencies for formal comment.

August 22, 1980: Memo from Constance L. Dupre to Commissioners, containing proposed interpretations on employee benefits. Differed from immediately preceding document in that: (1) requirement re: inclusion in defined benefit plan of employees hired within five years of normal retirement age was deleted; (2) required "post normal retirement age contributions only for defined contribution plans which are deemed 'supplemental' to other coexisting benefit plans;" and (3) clarification of relationship between long-term disability and employee benefits plans, providing that if disability occurs at or near normal retirement age, employer may require that long-term disability be used prior to beginning to pay pension benefits.

September 3, 1980: Memo identical to immediate preceding one, except thru: Preston David, Executive Director. (This is the memo which actually went to the Commission).

Fall, 1980: Proposed revisions placed on Commission agenda for consideration and vote. Pulled from agenda by then-Chair and not subsequently rescheduled for Commission consideration.

March 25, 1982: Memo from Michael Connolly, now-General Counsel, to SCEP, urging formal affirmance of existing DOL interpretation; no discussion of policy options previously considered by Commission.

APPENDIX XIV--Continued

AGE LIMITS FOR ENTRY INTO BONA FIDE APPRENTICESHIP PROGRAMS

Date of Publication: September 29, 1981, 46 FR 47724.

Summary: The EEOC issued in final form the Department of Labor regulation which provided that bona fide apprenticeship programs were not intended to be covered by the ADEA.

Chronology:

November 21, 1979: Commission publishes proposed Interpretations of the ADEA which delete existing DOL interpretation re: apprenticeship programs.

September 29, 1980: Commission publishes proposed rule reversing position of DOL on apprenticeship, providing that ADEA does cover bona fide apprenticeship programs.

____________, 1981: Commission, by tie-vote, declines to adopt proposed interpretation in final form.

July 28, 1981: Commission approves, in final form, existing DOL interpretation exempting bona fide apprenticeship programs from coverage under the Act. (See letter from Daniel E. Leach, Vice Chairman, to Hon. John Heinz, Chairman, Senate Special Committee on Aging).

APPENDIX XIV--Continued

MAXIMUM HIRING AGE AND MINIMUM MANDATORY RETIREMENT AGE FOR LAW ENFORCEMENT OFFICERS AND FIREFIGHTERS

Date of Publication: (nothing ever published separately; final interpretative regulations include bfoq section).

Summary: The Commission considered a variety of options to address the practice of state and local governments in setting maximum hiring and minimum mandatory retirement ages for police and firefighters. Specifically, the Commission considered a case by case litigation approach (as had been employed by the DOL); issuance of interpretations or guidelines governing the issue, to which courts would presumably accord substantial weight; utilization of the section 9 exemption authority. The Commission stayed all pending litigation during its contemplations with respect to the type(s) of enforcement mechanisms it would utilize.

Chronology:

March 7, 1980: confidential memo to Fred Dorsey, Director Office of Policy Implementation from Leroy Clark, General Counsel, addressing the policy issues and enforcement options discussed above.

March 25, 1980: Proposed Federal Register notice soliciting comments on age limits submitted to Commission for consideration; Commission never voted on it.

August 14, 1980: Memo from Constance Dupre, Associate General Counsel, to Leroy Clark, General Counsel, re: issue. The memo discusses studies commissioned by the EEOC; however, the EEOC did not submit any of these studies to the Committee. Memo's conclusions: "The available data indicate that entry-level age restrictions for police and firefighters are not necessary for public safety and that their use as a management tool should be regarded as a violation of the ADEA." "The reports and data we have been able to review indicate that while there is convincing evidence that firefighting is an arduous occupation, requiring a certain level of physical fitness, that fitness can be easily measured; that while age is a predictor, other physical factors such as body composition, hypertension, etc. are more accurate indicators; and that there is no longer a need to mandatorily retire those over a certain age." Recommendation of Legal Counsel was that the Commission either issue guidelines or utilize its section 9 exemption authority; idea was that both would be preferable to ad hoc litigation strategy. Ultimately, the Commission adopted precisely the litigation strategy.

APPENDIX XIV--Continued

INFORMAL ADVICE LETTERS IN RESPONSE TO REQUESTS AS TO REQUIREMENTS OF ADEA AND APPLICABILITY TO IDENTIFIED PRACTICES, POLICIES OR PLANS

Date of Letter: February 29, 1980

Summary of requested information: "Whether an employer may offset the payroll compensation of an employee who remains in active employment beyond the normal retirement date and who is receiving his retirement pension, by the amount of the pension benefit while he continues in employment."

Commission response: So long as employee does not receive less take-home pay while working or lower retirement benefits after retirement, offset probably does not violate the ADEA. Commission admonishes requestor that this is not formal opinion letter.

* * * * * * * * * * * *

Date of Letter: March 16, 1981

Summary of requested information: Whether credit union's insurance policy which provides for total repayment of a member's loan if s/he becomes totally disabled prior to age 60 violates the ADEA.

Commission response: Since the benefit is made available in connection with employment, it is subject to the ADEA. The policy appears to violate the ADEA because it provides for differential treatment based solely on age.

* * * * * * * * * * * *

Date of Letter: April 15, 1981

Summary of requested information: Whether there is a violation of the ADEA if disability coverage offered by employer (through one carrier) specifies that if employee under age 60 becomes permanently and totally disabled, his/her life insurance will be continued during disability at no cost to the employee while if disability occurs after age 60, employees do not benefit from any waiver of life insurance premium.

Commission Response: On its face, plan violates ADEA. Not sufficient information to determine whether it might fall within section 4(f)(2) exception.

* * * * * * * * * * * *

Date of Letter: April 21, 1981

Summary of requested information: Whether corporate insurance plan which provides for spousal and family coverage that assesses a higher fee if spouses are over 65 violates the ADEA.

APPENDIX XIV--Continued

Commission response: The policy may have a disparate impact on older workers, but more information needed to determine precisely whether there is a violation.

* * * * * * * * * * *

Date of Letter: August 17, 1981

Summary of requested information: Transmittal of letters from two older workers to Office of Legal Counsel for appropriate action.

APPENDIX XIV--Continued

FAA AGE-60 RULE FOR PILOTS

Date of Publication: Nothing published by the Commission; however final interpretative regulations delete FAA-Age 60 rule as example of bfoq.

Summary: Issues are whether the age-60 rule itself is a bfoq and whether age-60 for pilots can be used to justify other practices, e.g., refusal to allow pilots to downbid into flight engineer jobs?

Commission has participated as amicus in several airline cases and filed direct suit against airlines and/or airline employee unions in others.

The Commission, through its litigation and in testimony before the National Institutes of Health, has maintained that individualized testing is feasible and statutorily required with respect to any employment practice affecting age-60 pilots except removal from senior flight status of commercial pilots. The Commission does not believe that the FAA rule establishes a bfoq for non-commercial (i.e., private) pilots or for other cockpit positions. Note also that in its testimony before the National Institute of Health, the Commission stated that:

"[W]e believe that the question to be resolved is whether the age 60 limitation on the employment of commercial pilots is arbitrary. From the data presented to this panel, it appears that choosing age 60 is unwarranted because there is no factual basis to believe that all or substantially all pilots over that age are unfit to perform their duties, and because adequate testing is available to determine on an individual basis who is and who is not able to carry out the duties of pilot." Testimony of Constance L. Dupre, Associate General Counsel, EEOC, before the Panel on the Experienced Pilots Study, National Institute on Aging, National Institutes of Health, May 27, 1981, p.5.

APPENDIX XIV--Continued

CLARIFICATION OF THE INTERPRETATIVE BULLETIN ON EMPLOYEE BENEFIT PLANS RE: HEALTH INSURANCE AND MEDICARE

Date of Publication: Nothing published by the Commission.

Summary: The IB provides that an employer "may either 'carve-out' from its own health insurance plan those benefits actually paid for by Medicare, or place those employees in a separate health insurance plan which 'supplements' Medicare." (Memo from Constance L. Dupre, Acting General Counsel to SCEP, September 11, 1981, p. 2). The policy issue currently being addressed by the Commission is who (the employer, employee or both) should enjoy the benefit of added savings which will accrue because of the amount by which the employer may reduce coverage under his/her plan.

Chronology:

September 11, 1981: Memo from Constance Dupre to SCEP outlining issue and three options: (1) requiring the employer to pay the premium for his/her plan and the employee the Medicare premium, or require the employer to pay both but have the employee contribute back to the employer an amount equal to that contributed to the employer's plan by younger employees (this option provides all the savings to the employer); (2) requiring the employer to pay both premiums, and requiring payment from the employee only in the unlikely event the employer's cost for the older worker exceeded that for younger workers; or (3) requiring both to pay their pro rata share (in accordance with the contribution scheme applicable to the employer's plan). This memo opts for option #3.

January 19, 1982: Additional memo from Office of General Counsel. Not submitted to the Committee.

March 5, 1982: Memo from Raj Gupta, Supervisory Attorney (OPI) to Karen Danart, Deputy Director (OPI), discussing two preceding memo's. The memo states that Option 2 above is the most consistent with the IB.

Issue still pending.

APPENDIX XV

FISCAL YEAR 1981 CHARGES BY ISSUE, SEX, 5-YEAR AGE BAND

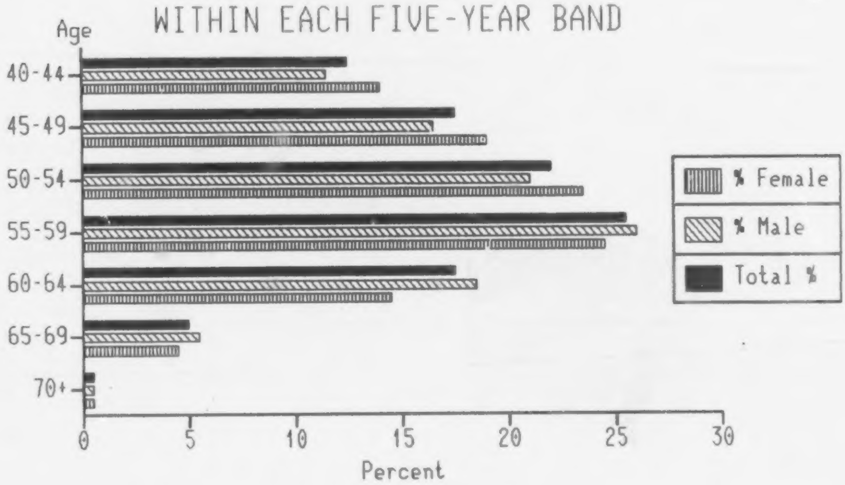
Issue	Hiring	Promotion	Demotion	Wages	Involuntary retirement discharge*	Training	Benefits	Terms and Conditions	Other	Number charges by sex	Total number charges	Percent of total
	F/M	F/M	F/M	F/M	F/M	F/M	F/M	F/M	F/M	F/M		
40 to 44------	75/151	68/33	21/27	9/4	233/248	8/32	11/14	70/42	126/217	459/663	1,122	12.3
45 to 49------	82/161	63/68	32/47	6/9	318/456	13/8	23/26	80/63	189/300	626/968	1,594	17.5
50 to 54------	102/181	86/70	44/63	11/10	410/603	19/6	22/37	108/104	205/392	786/1219	2,005	22
55 to 59------	83/196	82/96	44/96	16/22	411/652	6/6	22/54	108/127	276/473	808/1501	2,309	25.4
60 to 64------	32/96	30/65	19/41	4/8	237/545	3/9	29/52	74/89	135/288	477/1121	1,598	126
65 to 69------	10/36	6/7	8/9	3	81/136		17/35	18/25	37/62	139/312	451	5.0
70 and over---	1/1				4/5		1/2	/1	/13	7/13	20	.2
Total number--	385/822	335/337	168/273	48/53	1684/2646	49/61	125/220	459/451	968/1735	3302/ 5787		
Allegations---	1,207	672	441	102	4,330	110	345	910	2,703	9099**	9,099	100***
Percent of allegations--	11.1	6.2	4.0	1.0	40	1.0	3.2	8.4	25.0			

* EEOC broke out separately, but reported "0" under involuntary retirement.

** Total allegations equal 10,820, of which women account for 39 percent and men 61 percent.

*** Women account for 36.3 percent of all charges; men, 63.7 percent.

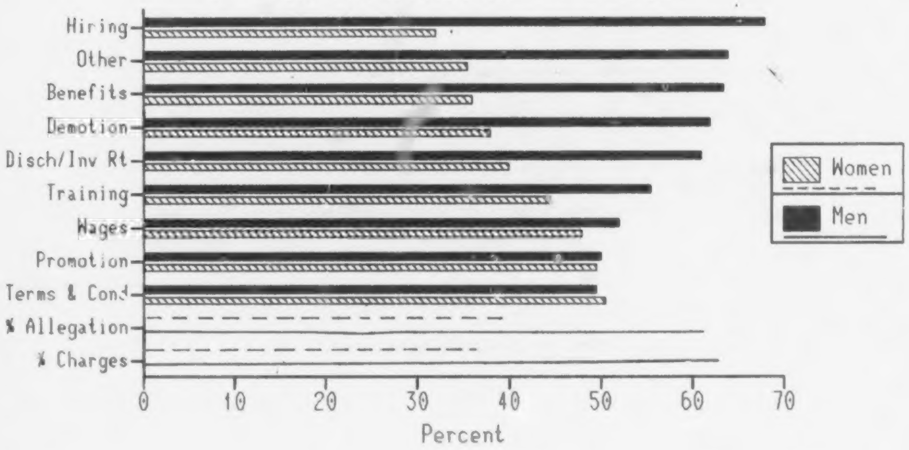
APPENDIX XV-A
PERCENTAGE OF ALL CHARGES WITHIN EACH FIVE-YEAR BAND



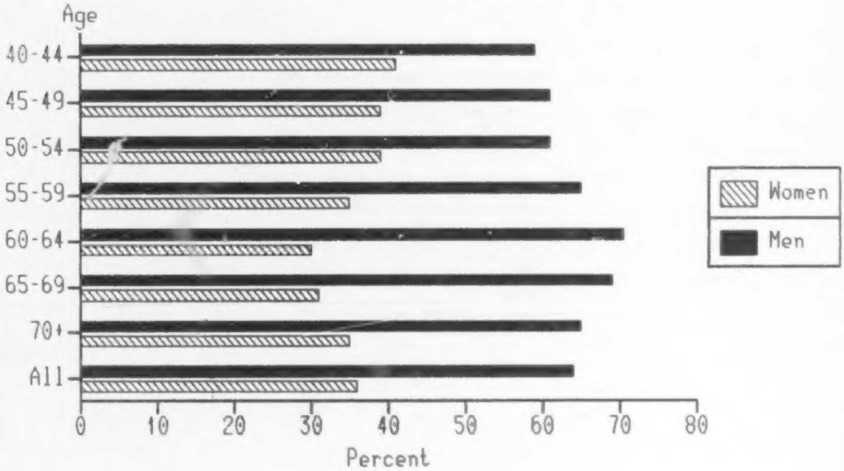
Totals: Female, 3,302; male, 5,797; all, 9,099.

APPENDIX XV-B

RELATIVE PROPORTION OF CHARGES/ALLEGATIONS BY SEX (ACCORDING TO ISSUE)

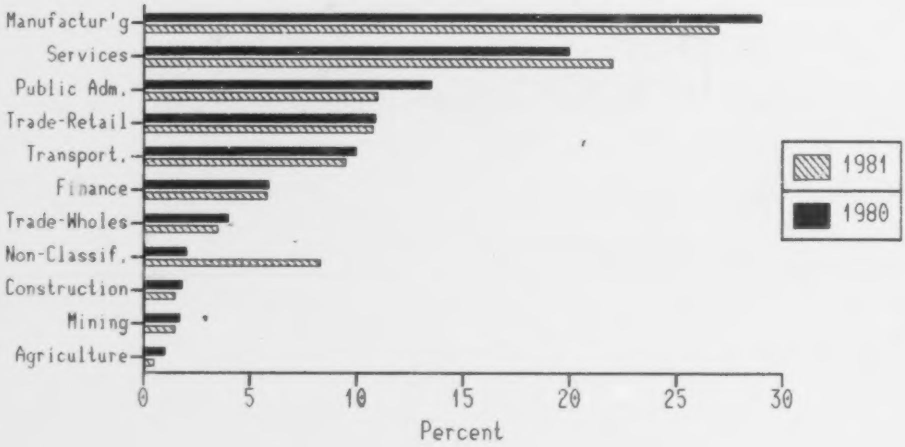


APPENDIX XV-C
PERCENTAGE OF ALL ADEA CHARGES BY SEX

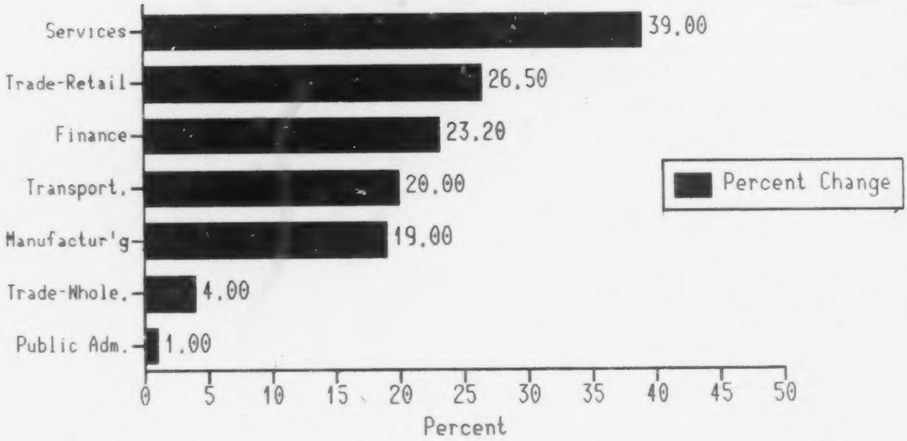


Female, 3,302; male, 5,797; total, 9,099.

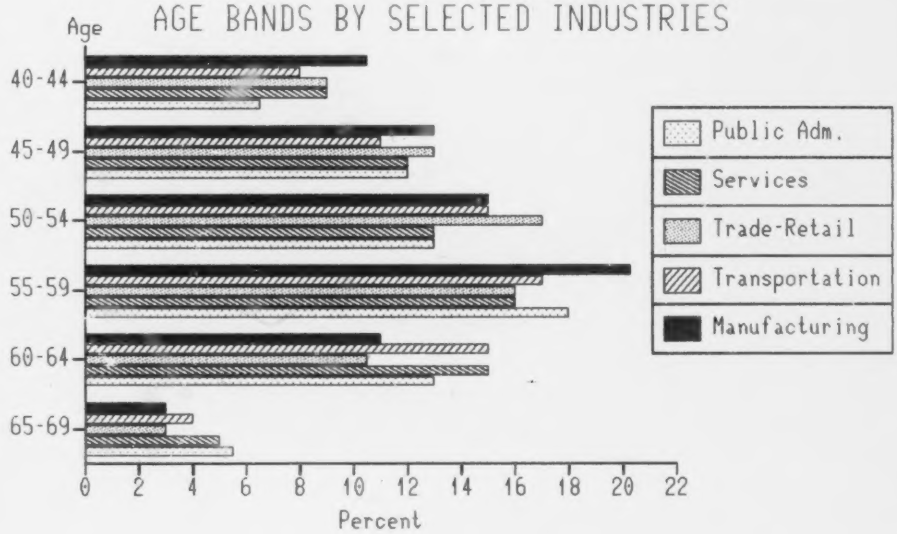
APPENDIX XV-D
PERCENTAGE OF ADEA CHARGES BY INDUSTRY



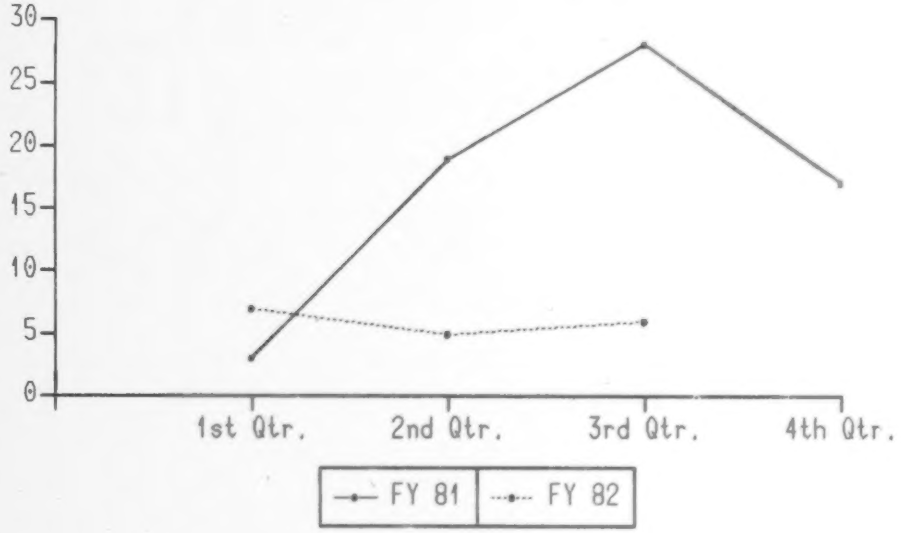
APPENDIX XV-E
PERCENTAGE CHANGE BY INDUSTRY FROM FY1980 TO FY1981



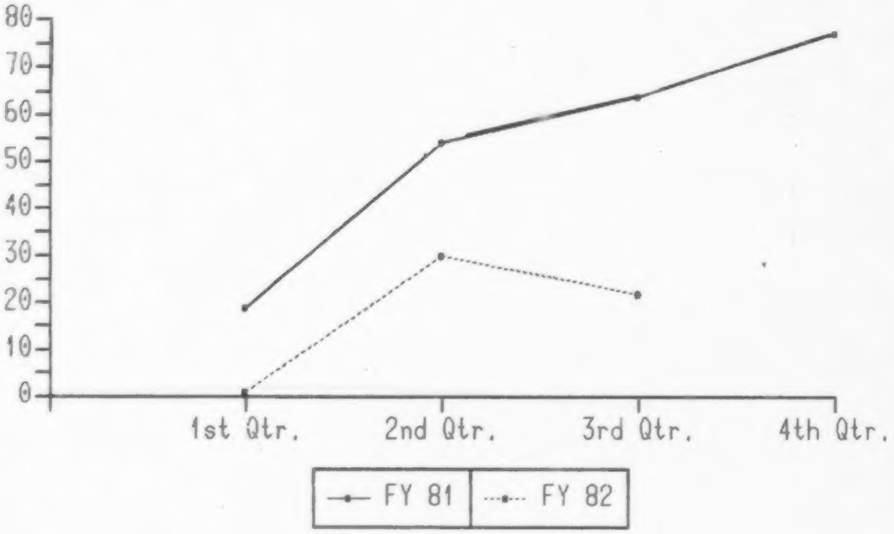
APPENDIX XV-F
INCIDENCE OF CHARGE FILING WITHIN AGE BANDS BY SELECTED INDUSTRIES



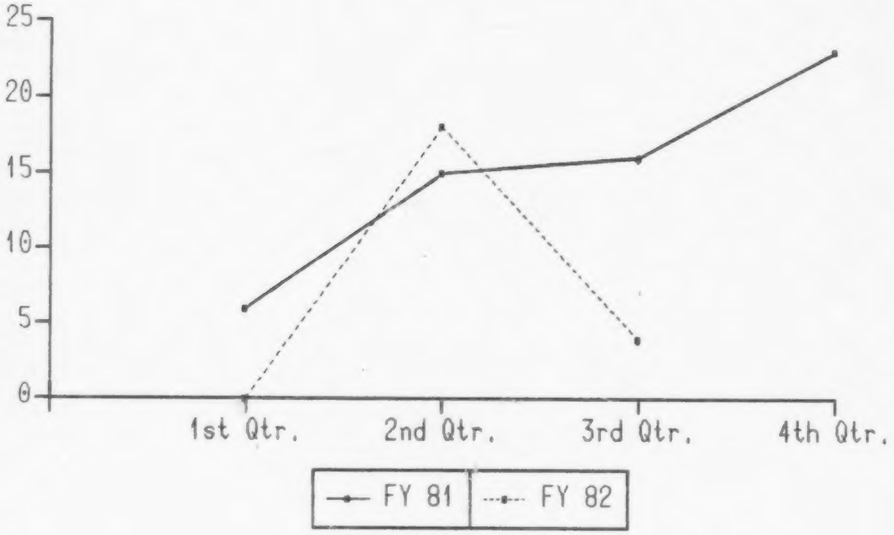
APPENDIX XVI(A)
EEOC ADEA LITIGATION AUTHORIZATIONS



APPENDIX XVI(B)
TITLE VII LITIGATION AUTHORIZATIONS



APPENDIX XVI(C)
EEOC EPA LITIGATION AUTHORIZATIONS



APPENDIX XVII - A

MAJORITY MEMBERS:
AUGUSTUS F. HAWKINS, CALIF., CHAIRMAN
WILLIAM (BILL) CLAY, MO.
TED WEISS, N.Y.
BALTASAR CORRADA, P.R.
PAUL SIMON, ILL.
HAROLD WASHINGTON, ILL.
CARL D. PERKINS, KY., EX OFFICIO

(202) 225-1927

MINORITY MEMBERS:
JAMES M. JEFFORDS, VT.
THOMAS E. PETRI, WIS.
MILLICENT FENWICK, N.J.
LAWRENCE J. DE NARDIS, CONN., EX OFFICIO

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
COMMITTEE ON EDUCATION AND LABOR
SUBCOMMITTEE ON EMPLOYMENT OPPORTUNITIES
B-346A RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515

April 15, 1982

Ms. Cathie A. Shattuck
Acting Chairman
Equal Employment Opportunity Commission
2401 E Street, S.W.
Washington, D.C. 20506

Dear Chair Shattuck:

I am concerned about personnel changes at the Commission which are to be implemented at EEOC headquarters and in its field offices. Indeed, it is curious to me that major personnel changes would be undertaken at a time when Senate approval of a new Chair of the Commission is plainly imminent.

As you know, the Subcommittee on Employment Opportunities has been and remains extremely interested in the administration of the Commission, particularly as administrative actions impact on substantive enforcement of equal employment opportunity laws.

I would appreciate receiving from you a detailed statement of all planned and pending personnel changes on both the Commission's and the General Counsel's staff. Please include a statement of your rationale for each such action along with some explanation for the urgency of the respective changes.

I cannot stress enough the seriousness of our concerns. The Subcommittee may wish to invite you to participate in hearings on this matter in the very near future. In the meantime, I would greatly appreciate a prompt response to my above request for information.

Sincerely,

Augustus F. Hawkins

Augustus F. Hawkins
Chairman

AFH:ecb

APPENDIX XVII - B

NINETY-SEVENTH CONGRESS

PATRICIA SCHROEDER, COLO., CHAIRWOMAN

MORRIS K. UDALL, ARIZ.
WILLIAM (BILL) CLAY, MO.
GUS YATRON, PA.
GEORGE E. DANIELSON, CALIF.

CHARLES PASHAYAN, JR., CALIF.
GENE TAYLOR, MO.
JAMES A. COURTER, N.J.
FRANK R. WOLF, VA.

U.S. House of Representatives
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE
209 CANNON HOUSE OFFICE BUILDING
Washington, D.C. 20515

TELEPHONE (202) 225-4025

April 15, 1982

Cathie Shattuck, Acting Chair
Equal Employment Opportunity Commission
Washington, DC 20506

Dear Ms. Shattuck:

Let me first welcome you as the new acting chair of the EEOC. I look forward to a productive working relationship with you in your capacity on the Commiswson. I, myself, have long had an active role in assuring that minorities and women are treated fairly in Federal employment, particularly in my role as Chairwoman of the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service.

It has come to my attention that a number of personnel changes have recently been implemented which may have an adverse impact on the operations of the Commission. Most notably, the Director of the Office of Field Service has been moved to the position of Director of the Office of Review and Appeals. Further personnel changes are rumored to affect the Litigation Branch of the Office of General Counsel, with that Office's Deputy General Counsel and Assistant Deputy General Counsel being transferred to other functions. I have also heard of the shuffling of Regional attorneys between Regional offices.

I would be interested in obtaining your report of the full extent of these rumored personnel changes, the motivations for the changes, and the prospective improvements in the delivery of services by the EEOC. From my experiences with the EEOC, I have become aware of the competence of many of those career civil servants who will be affected by these changes. I am sure you share with me my concern that this shuffling within the EEOC not undermine effective enforcement efforts in the area of equal employment opportunity, particularly with respect to EEOC's Litigation Branch. During these times of profound fiscal constraints within the Federal government, we cannot afford to act without a deep sense of the effect of our actions on the productivity and effectiveness of the civil service workforce.

With kind regards,

Sincerely,

PATRICIA SCHROEDER
Chairwoman

PS:al

APPENDIX XVIII

JOHN HEINZ, PA., CHAIRMAN
PETE V. DOMENICI, N. MEX.
CHARLES H. PERCY, ILL.
NANCY LANDON KASSEBAUM, KANS.
WILLIAM S. COHEN, MAINE
LARRY PRESSLER, S. DAK.
CHARLES E. GRASSLEY, IOWA
DAVID DURENBERGER, MINN.
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JOHN GLENN, OHIO
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DAVID PRYOR, ARK.
BILL BRADLEY, N.J.
QUENTIN N. BURDICK, N. DAK.
CHRISTOPHER J. DODD, CONN.
JOHN C. ROTHER, STAFF DIRECTOR AND CHIEF COUNSEL
E. BENTLEY LIPSCOMB, MINORITY STAFF DIRECTOR

United States Senate
SPECIAL COMMITTEE ON AGING
WASHINGTON, D.C. 20510

September 21, 1981

The Honorable J. Clay Smith
Acting Chairman
The Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

Dear Commissioner Smith:

This letter is to inform you that the Senate Special Committee on Aging will begin oversight review on the Equal Employment Opportunity Commission and all aspects of its enforcement of the Age Discrimination in Employment Act. The objective of the oversight procedure is to examine the Commission's enforcement activity of the Age Discrimination in Employment Act (ADEA) since it assumed jurisdiction over the statute three years ago. We will identify problem areas that might exist and recommend ways in which the Commission can improve enforcement activity.

It has been called to my attention that charges under the ADEA have increased over the last several years and make up almost a third of all charges filed under the various statutes for which the Commission holds enforcement responsibilities. We expect to find that management procedures, allocation of budget and staff resources and other activities pertaining to enforcement will reflect, in a proportional manner, the overall committment of the Commission to enforce the ADEA.

Discrimination in the work place of any sort is reprehensive and we realize that your agency cannot prevent or cure all biases that affect employment of citizens protected by civil rights statutes. But what we do expect, and require, from federal agencies holding Congressional mandates is that they execute their respective missions in the highest professional manner possible. As far as the Committee is concerned, this is especially true for the Commission and its ADEA responsibilities.

Mr. John Rother, Staff Director of the Special Committee on Aging, will be in contact with you to establish oversight procedures. We expect that the oversight activity will result in hearings at an appropriate time.

Please consider receipt of this letter as notice that oversight proceedings have begun.

Sincerely,

JOHN HEINZ
Chairman

JH/mbt

APPENDIX XIX

JOHN HEINZ, PA., CHAIRMAN
PETE V. DOMENICI, N. MEX.
CHARLES H. PERCY, ILL.
NANCY LANDON KASSEBAUM, KANS.
WILLIAM S. COHEN, MAINE
LARRY PRESSLER, S. DAK.
CHARLES E. GRASSLEY, IOWA
DAVID DURENBERGER, MINN.
LAWTON CHILES, FLA.
JOHN GLENN, OHIO
JOHN MELCHER, MONT.
DAVID PRYOR, ARK.
BILL BRADLEY, N.J.
QUENTIN N. BURDICK, N. DAK.
CHRISTOPHER J. DODD, CONN.
JOHN C. ROTHER, STAFF DIRECTOR AND CHIEF COUNSEL
E. BENTLEY LIPSCOMB, MINORITY STAFF DIRECTOR

United States Senate
SPECIAL COMMITTEE ON AGING
WASHINGTON, D.C. 20510

September 29, 1982

The Honorable Clarence Thomas, Chairman
Equal Employment Opportunity Commission
2401 E Street, N.W.
Washington, D.C. 20506

Dear Mr. Chairman:

Pursuant to our oversight responsibilities, the Senate Special Committee on Aging has been conducting a comprehensive overview of the EEOC's enforcement of the Age Discrimination in Employment Act. The enclosed draft report presents the Committee's findings. We are transmitting it to you in this format, prior to publication, for your review and comments.

The appendices referred to in the body of the report have not yet been printed. Thus, in order to expedite our transmittal, we are sending the report without them at this time. The information on which the appendices are based was provided by the Commission and is still in its possession. In the event, however, that you or your staff find reference to the appendices necessary for your review, we will be happy to provide xeroxed copies.

The Aging Committee recognizes that the EEOC is currently undergoing a headquarters reorganization and that field reorganization planning is also in progress. While this report assesses ADEA enforcement in the context of the agency's existing organizational structure, most of the preliminary findings and recommendations are substantive in nature, and thus, may well apply regardless of the reorganization.

In addition, I would appreciate the Commission's response to the following specific questions relative to the reorganization:

1. How will the agency's new Office of Program Research be structured to conduct its ADEA policy development function?
2. What role(s) will individual Commissioners play with respect to ADEA policy development? In the event that an individual Commissioner has been or will be assigned to play a lead role in the area of ADEA policy development, please designate him/her.
3. How will the agency monitor the activities of the Office of General Counsel to assure that the recent extreme litigation shortfall is not perpetuated?
4. Is the Commission's new Office of Program Operations currently contemplating elimination or modification of the MAP program planning and reporting requirements? Please describe any new reporting procedures under development.

5. In what manner will the Commission's new organizational structure facilitate the coordination of administrative/litigation enforcement and policy development functions under the ADEA?

I would appreciate your responses to these questions, as well as your more general comments, by October 20, 1982. I also request that you solicit specific comments from the Office of General Counsel with respect to those sections of the report dealing with that office.

Sincerely,

John Heinz

JOHN HEINZ
Chairman

JH/cot

Enclosure

APPENDIX XX

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

OFFICE OF
THE CHAIRMAN

November 4, 1982

Honorable John Heinz
Chairman
Special Committee on Aging
United States Senate
Washington, D. C. 20510

Dear Chairman Heinz:

This is in response to your letter of September 29 in which you asked me to respond to five specific questions regarding EEOC headquarters reorganization as it affects our enforcement of the Age Discrimination in Employment Act (ADEA). In addition, you asked us to review and comment on the Committee staff's draft information paper on EEOC's enforcement of the ADEA.

Your questions are answered in the order they were asked, and my comments on the report follow that. The thrust of the Headquarters Reorganization was the improvement of overall management of the agency through consolidation of related functions, reducing the number of Headquarters offices from 14 to 10, providing coordinated, program policy development assistance for the Commission and strengthening management accountability by reducing the span of control in the Office of Program Operations over the District Offices. While these changes may have some impact on the Commission's administration of the ADEA, particularly in terms of policy development and litigation strategy, I believe that the pending field reorganization now under study will have a greater impact on both charge-processing and litigation development. Please be assured that we will inform you of the results of the field study.

I. Questions

A. How will the agency's new Office of Program Research be structured to conduct its ADEA policy development function?

In its reorganization effort the Commission approved the establishment of the Office of Program Research. The Office has three divisions: Program Services Division, Research and Studies Division and the Surveys Division.

The major thrust of the Office of Program Research will be to provide staff assistance to the Commission for policy development, develop and recommend new or revised programs, perform research, evaluation and social science analysis for the Commission's policy needs, and provide in-house capacity for expert analysis by staff economists, psychologists, mathematical statisticians and industrial relations specialists.

The Program Services Division, in addition to providing analytical services to the Commissioners, will also provide expert technical assistance for Title VII and ADEA investigations and litigation.

The Research and Studies Division will recommend new or revised policy and program options to the Commission, particularly in more recently acquired jurisdictions such as the ADEA.

The new organization and the newly created Office of Program Research provides an instrumentality for quick and effective action on policy and program related issues for each of the Commissioners. Moreover, Commissioner involvement in the development of policy at the earliest stage is expected to have a direct, beneficial effect on EEOC's enforcement of the ADEA.

B. What role(s) will individual Commissioners play with respect to ADEA policy development? In the event that an individual Commissioner has been or will be assigned to play a lead role in the area of ADEA policy development, please designate him/her.

One of the major goals of the recent EEOC headquarters reorganization was to improve the agency's overall policy development process. Under the revised process, individual Commissioners will be directly involved in the initial stages of policy development by serving on issue-oriented task forces staffed by a new Office of Program Research. At this time, no specific issues or task groups have been assigned to individual Commissioners.

C. How will the agency monitor the activities of the Office of General Counsel to assure that the recent extreme litigation shortfall is not perpetuated?

Under the headquarters reorganization plan, the agency will be able to monitor the activities of the Office of General Counsel through the use of a computerized case-tracking system which, when installed and implemented, will enable it to provide routine, frequent reports and advice to the Commission concerning the status of pending litigation and litigation recommendations from field offices not approved by the Office of General Counsel.

With regard to the litigation shortfall cited in the report (Chapters 4 and 6), there was a significant decline in the number of ADEA suits filed by the Commission in FY 1982 as compared to FY 1981--26 from 89--but, as noted by the Commission's Acting General Counsel, the large number of filings in FY 1981 can be attributed to several factors not present in FY 1982, as follows:

1. The filing of 89 lawsuits during FY 1981 was the result of a concerted effort by ADEA staff specialists to surpass the previous high of 86 suits filed by the Labor Department in 1977; that is, to set a record not necessarily related to ADEA litigation strategy implementation. The effort was reflected in the fact that of 89 suits, 41 were filed in the last quarter of FY 1981, including 20 in the last month and seven on the very last day of the fiscal year. Thus, while 11 cases filed in FY 1981 were actually approved by the Commission in FY 1980, only one case approved in FY 1981 remained to be filed in FY 1982. Under normal circumstances, had a concerted effort not been made to set a new record, a dozen or more of the cases filed in FY 1981 would not have been filed until FY 1982. Admittedly, the added cases would not have made the FY 1982 figures outstanding, but at least there would not have been the precipitous decline noted by the Senate committee staff.

2. Also, because there was a concerted effort to file all litigable age charges which had been investigated but were not resolved despite conciliation efforts by the end of FY 1981, there was a dearth of age charges ready for litigation in the first part of FY 1982; i.e., the inventory of potential litigation vehicles was temporarily depleted until pending charges routinely advanced through the administrative process, thereby precluding their consideration for litigation until later in FY 1982.

3. Early in FY 1982, the Office of General Counsel realized that there were insufficient litigation support funds available to cover the lawsuits already pending. This meant that the Commission simply could not afford to file a great number of new suits under any statute. By March 1982, the former General Counsel, based upon a cost study conducted by the then-Deputy General Counsel, concluded that $1,400,000 in additional funds would be required just to litigate the pending lawsuits plus 100 new filings. However, in August the supplemental appropriations request for litigation support funds was reduced to $570,000 because it was clear that there was not sufficient time remaining in the fiscal year to complete the activities projected for the year on litigation, i.e., depositions, contracting for experts, etc. In fact, the agency received its supplemental appropriations only three weeks before the end of the fiscal year, and therefore, much of our planned litigation activity had to postponed until FY 1983.

D. Is the Commission's new Office of Program Operations currently contemplating elimination or modification of the MAP program planning and reporting requirements? Please describe any new reporting procedures under development.

No changes in the MAP planning and reporting requirements pertaining to the ADEA were occasioned by the Headquarters reorganization. There may, however, be a need for some modification of the MAP process as a result of the field reorganization study now underway. The Committee will be advised of any changes in MAP planning and reporting requirements which may occur following completion of this study.

E. In what manner will the Commission's new organizational structure facilitate the coordination of administrative/litigation enforcement and policy development functions under the ADEA?

The headquarters reorganization is designed to improve overall interagency coordination through the development of a closely knit top management team led by the Chairman. In addition, the closer involvement of individual Commissioners in the policy-development process and of the Commission as a body in mapping a litigation strategy will provide a better linkage of all the statutes administered by the agency. Operationally, there will be an emphasis on integration of compliance activities and litigation enforcement under Title VII, the ADEA and the Equal Pay Act. More detailed information on how this will be implemented in our field offices will be provided the Committee upon completion of the field study. We do feel that operational changes and cross-training are particularly important in terms of the administration of the ADEA, because it is projected that the Commission's ADEA workload will expand more rapidly than either the Title VII or EPA workload, due to the continued aging of the nation's workforce.

II. Comments

With regard to the paper generally, its conclusions seem to shift between two contradictory points of view: that the Commission has done an admirable job given the limited resources that have been available to it, but that it should have done more.

As an example, on page FFF 8 of the paper, the last full paragraph indicates that the ADEA function is understaffed vis-a-vis Title VII, in that ADEA charges constitute 19 percent of the Commission's intake but are allocated only 10 percent of the investigative resources. To say that is to assume that exactly the same amount of processing time should be allotted to processing charges filed under both statutes. Inasmuch as the ADEA does not mandate that the enforcing agency investigate each and every charge of age discrimination, the Commission does not allocate exactly the same amount of investigative resources to process age charges as it does to Title VII charges.

Further, the paper, on page FFF 9, takes the Commission to task for not directing adequate resources to directed investigations under the ADEA, for not considering whether ADEA enforcement would be enhanced by assigning more personnel to area offices and for not using some of the information in its own computers to develop targets for directed investigations. The paper noted in its executive summary that indeed, the Commission's ADEA resources, as well as some Title VII resources, have been devoted primarily to processing complaints filed by aggrieved individuals. However, with no additional resources, we are unable to channel significantly more ADEA personnel into area offices, nor could we justify transferring out of individual complaint-processing units the number of personnel that would be needed to investigate significantly more directed, class ADEA charges against EEOC-targeted employers against whom few, if any, charges have been filed. Thus, directed ADEA investigations will be maintained on a limited level for now.

There are three factual errors which should be corrected. The first one, on page FFF 9, is in the last paragraph, and reads as follows: "And the development of ADEA substantive guidelines is still in its embryonic stages." In fact, as noted on page MNY 20, the Commission's final interpretations under the ADEA were published in the Federal Register on September 29, 1981.

The second problem appears on page FFF 31. The first full paragraph on that page leaves the impression that Commission standards for accepting State and local fair employment practice agencies' ADEA charge closures are minimal. However, the Commission adopted ADEA charge-review procedures in April of 1982, and they require the same kind of documentation for accepting ADEA closures as EEOC has for adopting Title VII closures of State and local agencies. It should also be noted that ADEA field supervisors now participate in reviews of State and local case files heretofore made only by EEOC State and local unit personnel.

Third, on page MNY-HAND NITE-9, the report states in the third paragraph that it is difficult to compare the effectiveness of the ELI programs under various statutes because the ADEA reporting system does not allow one to determine at what stage in the processing a case was designated as an ELI. That is incorrect; there is a dated code in the report system for designation of ADEA cases as ELI's.

With regard to the sections of the report covering the Commission's ADEA litigation program, I believe my response to your third question explains the reasons for the disparity in the number of suits filed in FY 1982 as compared to FY 1981.

Concerning the ADEA lawsuits actually filed, we believe that the Commission's litigation enforcement program should closely parallel the charge process. Indeed, that is precisely what Congress envisioned when the charge process was added to the ADEA. By litigating issues involved in charges which cannot be conciliated, the Commission promotes the settlement of other charges involving the same issue through the establishment of court precedent. The Commission thus fulfills a statutory mandate in responding, first and foremost, to specific charges of age discrimination. Moreover, experience demonstrates that charges are the best and most reliable indicator of problem areas. By investigating the specific charges, the Commission largely avoids the need to expand limited resources on finding the aggrieved persons whom the ADEA was intended to protect.

Of course, as the committee staff points out in Chapter 4, Sections H(2)-(4), the concentration on unsettled issues has led to a somewhat unbalanced litigation program. It has meant that an extraordinary number of suits have been filed against State and local governments which refuse to drop maximum hiring age and/or mandatory retirement age policies for law enforcement officers and firefighters. While we recognize that this may operate "to the detriment of the rest of the litigation program," we believe that such concentration is necessary and warranted. By means of such concentration over a relatively short period of time, we hope that other employers will cease the practice of overt age discrimination in public safety occupations. Only by filing and prevailing in a number of suits can we hope to convince State and local governments of the necessity of dropping their age-based employment restrictions. Once that goal is achieved, the Commission can move on to other areas of litigation, precisely as the Labor Department did after concentrating for several years on overt age-discriminatory practices by employment agencies.

We do not concur in the suggestion in Chapter 4, Section H(5), that the Commission establish, in perpetuity, a discrete ADEA legal unit in the General Counsel's (OGC) headquarters office. We would note that the Office of General Counsel has already acted to form a special trial services unit to handle ADEA and Equal Pay Act matters. However, one of the primary functions of the unit will be to educate all OGC attorneys concerning ADEA matters, so that a specialized unit will become unnecessary. In the interim, the unit will be involved in all the areas mentioned by the Senate committee staff report, except for systemic litigation.

Because the primary functions of the ADEA/EPA unit in the Office of General Counsel will be advisory in nature, we cannot agree that the unit become heavily involved in systemic litigation, as suggested Chapter 4, Section H(6). Such litigation is more properly the concern of the Office of Systemic Programs, which might see fit to take on an ADEA case or perhaps even a concurrent ADEA/Title VII case. If such a case were to be filed, the ADEA/EPA unit could then offer advice as necessary.

Finally, a procedure is soon to be established whereby the Office of General Counsel will regularly and routinely advise the Commission of the status of pending litigation and litigation referrals, as elucidated in my response to your third question. The implementation of that procedure should allay concerns of the Senate committee staff expressed in Chapter 4, Section H(8) regarding Commission monitoring of OGC activities.

Thank you for giving me the opportunity to comment on these matters.

Sincerely,

Clarence Thomas

Clarence Thomas
Chairman

APPENDIX XXI

JOHN HEINZ, PA., CHAIRMAN
PETE V. DOMENICI, N. MEX.
CHARLES H. PERCY, ILL.
NANCY LANDON KASSEBAUM, KANS.
WILLIAM S. COHEN, MAINE
LARRY PRESSLER, S. DAK.
CHARLES E. GRASSLEY, IOWA
DAVID DURENBERGER, MINN.
LAWTON CHILES, FLA.
JOHN GLENN, OHIO
JOHN MELCHER, MONT.
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BILL BRADLEY, N.J.
QUENTIN N. BURDICK, N. DAK.
CHRISTOPHER J. DODD, CONN.
JOHN C. ROTHER, STAFF DIRECTOR AND CHIEF COUNSEL
E. BENTLEY LIPSCOMB, MINORITY STAFF DIRECTOR

United States Senate
SPECIAL COMMITTEE ON AGING
WASHINGTON, D.C. 20510

November 19, 1982

The Honorable Clarence Thomas, Chairman
Equal Employment Opportunity Commission
2401 E Street, NW
Washington, D.C. 20506

Dear Mr. Chairman:

I have received and reviewed your letter of November 4, 1982, containing answers to specific questions by the Senate Special Committee on Aging as well as comments on the Committee's oversight report. My Committee colleagues and I recognize that the Commission needs more time and experience under its new structure before the questions we previously enumerated can be fully and specifically answered. And we will, of course, remain very interested in continuing to assess the Commission's ADEA enforcement activities.

With respect to your overall comment that the conclusions of the report seem to be contradictory, shifting between the positions that the Commission has done an admirable job but could have done more, we believe there is no such inconsistency. To suggest that the Commission has performed its functions fairly well, especially in some specific areas, does not mean that there is no room for constructive criticism. For example, while we recognize that the Commission pays far greater attention to individual charging parties than the Department of Labor did, we still question whether the balance that was struck between individual charge processing and directed activity is a sound one. Similarly, while we applaud the Commission's litigation efforts during its first two full years of enforcement, we believe that its program should be assessed to determine the soundness of its strategy and concentration of cases. The purpose of oversight is neither to praise uncritically the agency's efforts nor to condemn unreasonably various shortcomings. Our intention was to provide a balanced report, informative to Congress, the Commission and the public. It was our hope that the Commission would carefully review and consider our observations and suggestions. We are concerned that your letter of November 4 does not adequately respond to these comments and recommendations.

For example, in the area of the Commission's ADEA litigation program, we recognize the significance of the two factors which you cite on page 3 of your letter explaining, to some extent, the ADEA litigation shortfall in fiscal year 1982: first, that fiscal year 1981 was really a banner year for ADEA litigation and, second, that budgetary cuts impacted the Commission's litigation efforts. However, we note that the final number of cases filed in fiscal year 1982 — 26 — is only slightly more than one per district office. This fiscal year 1982 number is virtually identical to the number filed by the Department of Labor and the EEOC during fiscal year 1979, i.e., 25. And in fiscal year 1980, the Commission filed over twice that number (52).

Moreover, as we noted in the report, we reviewed litigation authorizations and found the highest number for fiscal year 1982 to fall within the first quarter. In the second quarter, only five cases were authorized, and in the third (the last quarter for which we had data available at the time of our review) only six were approved. Assuming, as you suggest, that the extremely high number of authorizations and filings in fiscal year 1981 operated to deplete somewhat the supply of cases which otherwise would have been filed during the first quarter of fiscal year 1982, we would nonetheless have expected a steady increase in cases recommended and approved for litigation during the second and third quarters of fiscal year 1982. That apparently did not happen. Thus, we remain concerned about the precipitious decline in the Commission's litigation program.

We are also troubled by the Commission's stated intent to maintain a limited level of directed investigative activity (page 5 of your letter), especially coupled with your comments regarding systemic ADEA enforcement efforts. As we noted in the report, the EEOC's long and, until recently, unsatisfactory history in the area of Title VII systemic enforcement indicates that unless and until there is a sincere institutional commitment to systemic activity, it simply will not occur. We commend the Commission for making and maintaining that commitment in the area of Title VII enforcement, through both its CIC and Systemic programs. And we strongly suggest the necessity of a similar kind of commitment in the area of ADEA enforcement.

With respect to your specific comments on the Committee report, we have noted the errors you cite in your letter and will treat them accordingly in the final report.

In the coming months, the Senate Special Committee on Aging looks forward to maintaining a continued working relationship with you and members of your staff. The Committee is most interested in the progress of the field reorganization study. In addition, we stand ready to assist you in any matters which will enhance the EEOC's efforts in the area of ADEA enforcement.

Sincerely,

John Heinz

JOHN HEINZ
Chairman

JH/agt